(23,046)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 970.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MRS. CORDIE McWHIRTER, ADMINISTRATRIX OF THE ESTATE OF ETWAL McWHIRTER, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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1 COMMONWEALTH OF KENTUCKY:

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol at Frankfort, on the Seventeenth Day of November, 1911.

The Court of Appeals.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILROAD COMPANY, Appellant,

vs.

Mrs. CORDIE MCWHIRTER, Administratrix of the Estate of Etwall McWhirter, Deceased, Appellee.

On Appeal from the Hickman Circuit Court.

Be it remembered that heretofore on the 18th day of March, 1911, the appellant by its attorney filed in the office of the Clerk of the Court of Appeals a transcript of the record, and which is in words and figures as follows, to-wit:

2 Pleas Before the Hon. Sam E. Jones, Special Judge of the Hickman Circuit Court, at the Court House in the City of Clinton, Kentucky, on February 8, 1911.

Hickman Circuit Court.

Mrs. CORDIE MCWHIRTER, Administratrix of the Estate of Etwall McWhirter, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILROAD COMPANY, Defendant.

Be it remembered that heretofore, on August 10, 1910, the plaintiff, by Attorney, filed her petition herein, which is in words and figures as follows, to-wit:

"The plaintiff, Mrs. Cordie McWhirter, administratrix of the estate of Etwal McWhirter, deceased, says that heretofore, to-wit: on the 23rd day of February, 1910, Etwal McWhirter departed this life intestate, domiciled in and a resident of McCracken County, Kentucky; that the said Etwal McWhirter, deceased, left surviving him his widow, this plaintiff, and four infant children, to-wit; Zay McWhirter, aged twelve, Zelma McWhirter aged ten, Leota McWhirter aged seven, and Edward McWhirter aged five, for whose benefit the action hereinafter set out is brought by this plaintiff, as administratrix of the estate of the said Etwal McWhirter, deceased, that at the time of the death of the aforesaid intestate, he was a

resident and citizen of McCracken County, Kentucky and
3 that his widow, this plaintiff, was at the time of his death, and is now a resident of McCracken County, Kentucky, and that on the — day of July, 1910, she was duly appointed and qualified as administratrix of the estate of Etwal McWhirter, deceased, by the County Court of McCracken County, Kentucky, which Court was the Court having competent jurisdiction to appoint an administratrix of the aforesaid estate; that she immediately entered upon the discharge of her duties as said administratrix, and has been since said time, and is now duly appointed, qualified and acting administratrix of the estate of Etwal McWhirter, deceased. Attested copies of her appointment and qualification as administratrix are filed herewith and made a part hereof and marked Exhibit "A".

Plaintiff further says that the St. Louis Iron Mountain and Southern Railway Company is a corporation created by and existing under the laws of the State of Missouri, with its principal place of business in St. Louis, Missouri, having authority to sue and be sued in its corporate name aforesaid, St. Louis, Iron Mountain & Southern Railway Company; that the said defendant is authorized to, and does business as a common carrier by railroad, both of passengers and freight in Missouri and other states; that the said defendant is engaged in the business of a common carrier in the State of Kentucky, and has its principal office and place of business in the State of Kentucky at Columbus, in Hickman County, Kentucky.

Plaintiff now says that at the time of the death of the said Etwal McWhirter, deceased, he was employed by and in the service of the St. Louis, Iron Mountain & Southern Railway Company, defendant herein, in the capacity of Flagman; that the death of the said
4 Etwal McWhirter resulted from the wrongful acts of the Conductor and Engineer in charge of the train and locomotive on which the said Etwal McWhirter, deceased, was at the time of his death employed and acting as flagman, as aforesaid, and by the negligence and wrongful acts of the train dispatcher and higher officials, who had control and authority over this plaintiff's intestate, of the defendant, St. Louis, Iron Mountain & Southern Railway Company; that the said Etwal McWhirter was killed while so acting as flagman, and at a time he was employed by the St. Louis, Iron Mountain & Southern Railway Company by being run over and crushed and mangled by the train and locomotive of the said defendant herein; that at the time of the said accidental death of the aforesaid Etwal McWhirter, the train and locomotive on which he was so employed and on which he was acting in the capacity of flagman for the defendant herein, was engaged in the transportation of freight between the States of Missouri and Illinois, and that the said train and locomotive aforesaid was an interstate train and was engaged in interstate commerce between the aforesaid States of Missouri and Illinois.

Plaintiff further says that her cause of action herein arose against the defendant by reason of the wrongful and negligent death of her aforesaid husband, Etwal McWhirter, which was occasioned by the negligent and wrongful acts of the officers and agents of the defend-

ant, as aforesaid, in managing and operating its train, while her husband was employed by the defendant, St. Louis, Iron Mountain & Southern Railway Company, as flagman on a train and locomotive engaged in interstate commerce as aforesaid; that her said husband had been permitted and required by the officers and agents of the defendant to be and remain on duty for a longer period than sixteen consecutive hours next before the aforesaid accident, and in violation of Chapter 29-39 Section 2, 34 Statute 1416, of the Acts
5 of Congress of the United States relating to interstate commerce, and being a part of an act entitled "An Act To Promote The Safety Of Employés And Travelers Upon Railroads By Limiting the Hours of Service of Employés Thereon", which became a law on the 4th day of March, 1907, and also an act entitled "An Act Relating to The Liability Of Common Carriers By Railroad To Their Employés In Certain Cases", which became a law on the 22nd day of April, 1908; and that the aforesaid negligent and wrongful acts of the officers and agents of the said defendant, and the said violation of the laws of the United States relating to interstate commerce were the proximate and sole causes of the death of her said husband, and she relies on the laws of the United States made and provided in such cases.

Plaintiff now says that the said Etwal McWhirter, deceased, was a young and able bodied man aged thirty-four years, and that his expectancy of life was, at the time of his death, more than twenty-eight years; that he was capable of earning $100.00 per month, and that at the time of his death he was capable of, and was earning a living for this plaintiff and his aforesaid infant children, and was their sole and only support, and that by reason of the wrongful and negligent acts of the defendant, and its officers and agents, and the aforesaid violations of law, as set out above, which acts and violations of law resulted in the death of the said Etwal McWhirter, she has been damaged in the sum of $25,000.00 and is now entitled to recover of the defendant the aforesaid sum of $25,000.00.

Wherefore, plaintiff prays for a judgment against the defendant for the sum of $25,000.00, for her costs herein expended, and for all proper orders and relief.

EATON & BOYD,
Att'ys for Pl'ff."

6 "Act March 9, 1907, C. 2939. (S. 5133.)

An Act to Promote the Safety of Employees and Travelers Upon Railroads by Limiting the Hours of Service of Employees Thereon (34 Stat. 1415.)

SECTION 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or per-

mitted to again go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided that no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in cases of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: Provided further, The Interstate Commerce Commission may, after full hearing in any particular case and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case."

7 Said petition is endorsed on the back thereof as follows, to-wit: "Filed and summons and copy issued Aug 10, 1910. Jno. R. Kemp, Clk."

The summons which issued is in words and figures as follows, to-wit:

"The Commonwealth of Kentucky to the Sheriff of Hickman County:

You are commanded to summon St. Louis, Iron Mountain & Southern Railway Company to answer, in ten days after the service of this summons, a petition filed against it in the Hickman Circuit Court, by Mrs. Cordie McWhirter, Admrx. of the estate of Etwal McWhirter, dec'd. and warn it that upon its failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt and you will make due return of this summons within ten days after the service thereof to the Clerk's office of said Court.

Given under my hand as Clerk of said Court, this 10th day of August, 1910.

JNO. R. KEMP, *Clerk.*"

Said summons is endorsed on the back thereof as follows, to-wit: "Executed by delivering a copy of the within summons to E. E. Griggs, he being the nearest agent for the St. Louis, I. M. & Southern R. R. in this County to this County Seat. This Aug. 10, 1910. M. E. Slayden, S. H. C."

And afterwards at a Circuit Court continued and held for the County of Hickman, on October, 10, 1910, the following proceedings were had herein, to-wit:

"The defendant, by attorney, offered to file its petition to transfer this cause to the United States District Court at Paducah, Kentucky, and offered to file bond in support of same, to all of which plaintiff, by attorney, objected."

8 The petition for removal referred to is in words and figures as follows, to-wit:

"To the Honorable Circuit Court, Hickman County, State of Kentucky:

Your petitioner, the St. Louis, Iron Mountain and Southern Railway Company, respectfully states that it is the defendant in the above entitled action and that the matter in dispute therein, exclusive of interest and cost, exceeds the sum of Two Thousand Dollars, that said action is of a civil nature, that it is an action wherein Cordie McWhirter, as administratrix of the estate of Etwal McWhirter, deceased, claims of your petitioner the sum of Twenty Five Thousand Dollars, damages for the loss of the life of the said decedent, through what is claimed to have been the negligence, carelessness and wrongful acts of the defendant in operating its trains engines and cars, whereby and by reason thereof plaintiff was killed, and that said death resulted from the wrongful acts of the Conductor and Engineer in charge of the train and locomotive on which the said Etwal McWhirter, deceased, was, at the time of his death, employed and acting as flagman and by the negligence and wrongful acts of the train dispatcher and higher officials, who had control and authority over this plaintiff intestate and that said Etwal McWhirter was killed while so acting as flagman and at a time he was employed by the St. Louis, Iron Mountain and Southern Railway Company. That he was killed by being run over and crushed and mangled by the train and locomotive of the said defendant herein All of which claims your petitioner will controvert. That your petitioner was at the time of the commencement of this action and still is a corporation created by, and organized under and pursuant to, the laws of the State of Missouri, and not under the laws of the State of Kentucky, and operating a railroad through the

9 length of the state of Missouri, and is a citizen of such state and not of the State of Kentucky, and that the plaintiff, Cordie McWhirter, was at the time of the commencement of this action, and still is, a citizen of Kentucky, and a resident of said state, of which state of Kentucky the said Atwel McWhirter was a citizen at the time of his death.

Your petitioner offers herewith a bond with good and sufficient security for its entering in the said Circuit Court of the United States for the district of Kentucky, on the first day of its next session a copy of the record in this case and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully and improperly removed thereto.

And it prays this court to proceed no further herein except to make an order of removal and to accept the said surety and bond,

and to cause the record herein to be removed into the said Circuit Court of the United States for the District of Kentucky."

ST. L., I. M. & S. R. CO.,
By Att'y."

Said petition for removal is endorsed on the back thereof as follows, to-wit: "Offered to be filed in open Court. Oct. 10, 1910. Jno. R. Kemp, Clk."

The bond for removal to United States Circuit Court is in words and figures as follows, to-wit:

"Know all men by these presents that we, The St. Louis, Iron Mountain and Southern Railway Company as principal, and E. T. Bullock and J. A. Porter, as sureties, are held and firmly bound unto Cordie McWhirter, Administratrix, and all other persons whom it may concern, in the penal sum of $250.00, for the payment of which well and truly to be made, we bind ourselves, our heirs, representatives and assigne-s, jointly and severally, firmly by these presents.

Yet upon these conditions that The St. Louis, Iron Mountain and Southern Railway Company, having petitioned the Hickman Circuit Court of Hickman County, State of Kentucky, for the removal of a certain cause therein pending, wherein Cordie McWhirter, Administratrix of Atwel McWhirter, deceased, is plaintiff, and the St. Louis, Iron Mountain and Southern Railway Company is defendant, to the Circuit Court of the United States in and for the District of Kentucky. Now if said St. Louis, Iron Mountain and Southern Railway Company, your petitioner shall enter in said Circuit Court of the United States on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded in said Circuit Court of the United States if said Court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation is to be void, otherwise in full force and effect.

Witness our hands and seals this the — day of —, 1910.

ST. LOUIS, IRON MOUNTAIN &
SOUTHERN R. R. CO.,
By E. T. BULLOCK, *Atty.*
E. T. BULLOCK,
J. A. PORTER."

Said bond is endorsed on the back thereof as follows, to-wit: "Offered to be filed in open Court. Oct. 10, 1910. Jno. R. Kemp, Clk."

And afterwards at the same Term and on Oct. 10, 1910, the following proceedings were had herein, to-wit:

"The parties appeared by their attorneys and the Court holds that the bond offered is good and sufficient and, being fully advised,

overruled the motion to transfer this cause to the United
11 States District Court, to which ruling of the Court defendant objects. The defendant then filed its answer herein and the defendant then entered its motion to set this cause for trial for Wednesday, the 9th day of the present Term."

The answer referred to is in words and figures as follows, to-wit:

"Now comes the defendant, St. Louis, Iron Mountain & Southern Railway Company, and for answer to the petition of the plaintiff, Mrs. Cordie McWhorter, Administratrix of the Estate of Etwal McWhorter, deceased, says:

That it admits that, at the time of the death of Etwal McWhorter, he was in the employ of the defendant in the capacity of flagman; but it denies that the death of Etwal McWhorter resulted from the wrongful acts of the conductor and engineer in charge of the train and locomotive on which the said Etwal McWhorter was at the time of his death employed, and acting as flagman. And denies that by reason of the negligence and wrongful acts of the train dispatcher and higher officials, who had control and authority over Etwal McWhorter, he came to his death. And denies that the death of Etwal McWhorter was occasioned by the negligent and wrongful acts of the officers and agents of the defendant in managing and operating its train, while the said Etwal McWhorter was employed by the defendant, St. Louis, Iron Mountain & Southern Railway Company, on a train and locomotive engaged in interstate commerce.

And defendant denies that Etwal McWhorter had been permitted and required by the officers and agents of the defendant to be and remain on duty for a longer period of time than sixteen consecutive hours next before the aforesaid accident, and in violation of
12 Chapter- 29-39, Section 234, Statute- 14-16, of the Acts of Congress of the United States relating to Interstate Commerce, and being a part of an act entitled:

"An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of the employés thereof."

Which became a law on the 4th day of March, 1907. And also an act entitled:

"An Act relating to the liability of common carriers by railroad to their employés in certain cases."

Which became a law on the 22nd day of April, 1908.

And defendant denies that the violation of the laws of the United States relating to interstate commerce was the proximate and sole cause of the death of said Etwal McWhorter.

The defendant, further answering, says: Etwal McWhorter was killed February 23, 1910, at 7:25 A. M. at Wolf Lake, Illinois; that he was a flagman on a freight train which was going in at Wolf Lake, a station on defendant's road, to tie up, with Conductor Cooper in charge on an Extra 503 going south; that while going in on a siding at Wolf Lake, Illinois, Etwal McWhorter, while acting as flagman, went out on the running board on the left side of the engine; went down on the pilot and on to the ground to run ahead

to throw the switch, as it was his duty to do to head in at Wolf Lake; and, while running or starting to run, he stumbled or slipped and fell just in front of the engine, and the engine passed over him killing him at the time. That the killing was an accident and was unavoidable.

And defendant denies that by reason of any negligence or carelessness on the part of the engineer in charge of said engine, or of any officers, agents, or servants of the defendant, Etwal McWhorter lost his life. It denies plaintiff's right to recover in the action
13 the sum of Twenty-Five Thousand Dollars as damages, or any other sum.

And now having answered, it prays to be dismissed with its costs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
By E. T. BULLOCK, *Att'y.*"

Said answer is endorsed on the back thereof as follows, to-wit: "Filed in open Court. Oct. 10, 1910. Jno. R. Kemp, Clk."

And afterwards at the same term and on October, 13, 1910, the following proceedings were had herein, to-wit:

"The plaintiff, by attorney, filed a reply herein, and by agreement, this cause is continued."

The reply referred to is in words and figures as follows, to-wit:

"Comes the plaintiff, and for reply to the answer of the defendant herein, says it is true, and she admits that her decedent, Etwal McWhirter, was killed on February, 23rd, 1910, at Wolf Lake, Illinois; but she denies that said killing occurred at 7:25 A. M., as alleged in the answer. She admits that the said Etwal McWhirter was a flagman on a freight train which was going in at Wolf Lake, a station on defendant's road; but she denies that conductor Cooper was in charge of said train. She admits that said train was known as extra 503 going South, and she admits that while acting as flagman, and in the performance of his duties as such flagman, that the decedent, Etwal McWhirter, was run over and killed by said engine at the time alleged in the petition, and she denies that said killing was an unavoidable accident. She says that she has no knowledge or information sufficient to form a belief as to whether or not the said decedent while running or starting to run stumbled or
14 slipped or fell just in front of the engine, or that by reason of such stumbling, slipping and falling the engine passed over him, thus killing him.

Wherefore, the plaintiff prays as in her petition.

EATON & BOYD,
Att'ys for Plaintiff."

Said reply is endorsed on the back thereof as follows, to-wit: "Filed in open Court. Oct. 13, 1910. Jno. R. Kemp, Clk."

And afterwards at a Circuit Court continued and held for the County of Hickman on February, 7, 1911, the following proceedings were had herein, to-wit:

"On motion of defendant, by attorney, ordered that the amended answer filed in Clerk's Office be now filed of record."

The amended answer referred to is in words and figures as follows, to-wit:

"Now comes the defendant, St. Louis, Iron Mountain and Southern Railway Company, and amends its original answer herein and says that Edward McWhirter entered the service of the Defendant as brakeman, or made his application for such employment on the 27th day of Jan. 1910, and that when he so entered the service of the defendant as brakeman he well knew the hazard of his employment, and accepted the said employment with the express understanding, contract and agreement that he assumed all risks of said employment as to accidents incident to said employment. The original of said contract will be filed herewith marked exhibit B, and is referred to as evidence and *asks* to be read as such.

Wherefore, defendant prays as in its original answer.

ST. L., I. M. & S. R. R. CO.,
By Att'y."

15 Said Amended Answer is endorsed on the back thereof as follows, to-wit: "Filed in Clerk's office. Dec. 16, 1910. Jno. R. Kemp, Clk. Filed in open Court Feby. 7, 1911, Jno. R. Kemp, Clk., T. McMasters, D. C.,

The plaintiff then filed her amended petition and reply to said amended answer, which are in words and figures as follows, to-wit:

"Now comes the plaintiff and begs leave of the Court to file this her amended petition, and for cause, says that by mistake and oversight it was alleged that the death of her husband, Etwal McWhirter, was occasioned by the wrongful acts of the conductor and engineer in charge of the train on which her said deceased was employed at the time of his death; but she now says that said death was occasioned by the wrongful and negligent acts of the said conductor and engineer in charge of the train and locomotive on which the said Etwal McWhirter, deceased, was employed at the time of his death, and as alleged in the original petition.

Wherefore, she prays as in her original petition.

EATON & BOYD,
Att'ys for Plaintiff."

Said amended petition is endorsed on the back thereof as follows, to-wit: "Filed in open Court, Feby. 7, 1911. Jno. R. Kemp, Clk. By T. McMasters, D. C."

"Now comes the plaintiff, Mrs. Cordie McWhirter, administratrix of the estate of Etwald McWhirter, deceased, and for reply to the amended answer filed herein *and* admits that the said Etwald Mc-

Whirter, deceased, entered the service of the defend- as brakeman about the 27th day of January, 1910; but she denies that he accepted the employment with the express understanding, contract and
16 agreement that he assumed all risk of his said employment as to any accidents incident to same.

Wherefore, she prays as in her original petition.

EATON & BOYD,
Att'ys for Plaintiff."

Said Reply to amended answer is endorsed on the back thereof as follows, to-wit: "Filed in open Court. Feb. 7, 1911. Jno. R. Kemp, Cl'k. By T. McMasters, D. C."

And afterwards on the 8th day of February, 1911, the following proceedings were had herein, to-wit:

"The parties appeared by their attorneys and the defendant filed the original contract and application for Etwald McWhirter with the St. Louis, Iron Mountain and Southern Railway Company, and then came a jury, to-wit:

Henry Floyd, J. B. Phillips, A. B. Murchison, G. W. Byassee, Walter McPheeters, Will Steward, J. R. Seay, J. R. Bugg, M. P. Gore, M. C. Hopkins, C. W. Mix, and A. J. Robinson, who were elected, tried and sworn to well and truly try the issue joined. On motion of the defendant ordered that the Official Stenographer take notes of the evidence, and after plaintiff had closed her evidence defendant moved the Court to give to the Jury instruction No. 1, which the Court refused to give, to which ruling of the Court defendant excepts, and at the close of all of the evidence plaintiff moved the Court to give to the Jury instructions, A, B, C, and D, which the Court refused to give, to which ruling of the Court plaintiff excepts. Defendant then moved the Court to give to the Jury instruction- J, Z and W, which the Court refused to give, to which ruling of the Court defendant excepts. The Court then, at the instance of plaintiff, gave to the jury instructions C, E, and H, to the giving of which defendant excepts. The Court then, at the instance of plaintiff, gave to the jury instruction I, to the giving of which de-
17 fendant excepts. The Court then gave to the Jury instruction X, to the giving of which both plaintiff and defendant excepts, and the jury, having heard the argument of counsel, retired to their room and then returned into Court the following verdict:

"We, the Jury, find for plaintiff the sum of $3,000.00.

M. P. GORE,
One of the Jury."

It is, therefore, adjudged by the Court that the plaintiff recover of the defendant, the St. Louis, Iron Mountain and Southern Railway Company, the sum of ($3,000.00) Three Thousand Dollars, the amount, by the Jury in their verdict, assessed, with interest thereon at the rate of 6 per cent per annum from February 8, 1911, until paid, and her costs herein expended, for which execution is awarded."

The contract and application referred to is in words and figures as follows, to -wit:

"The Missouri Pacific Railway Company,
St. Louis, Iron Mountain & Southern Railway Co.
and
Leased, Operated and Independent Lines.

Application for Employment.

Read Carefully.

No applicant will be permitted to enter the service until he has filled out and signed this blank.

All applications for employment as Conductor, Brakeman, Train Baggageman, Engineer, Fireman, Hostler, Station Agent, Dispatcher, Operator, Roadmaster, and Section Foreman, Yardmaster, Assistant Yardmaster, Switchman, Switch Tender, Yard or Train Flagman, Shop, machinery and Bridge employés, Station Clerks and such other employés as may be hereafter designated, must be made in duplicate on this blank, by Applicant personally. When this blank is filled out in accordance with the instructions herein,
18 the applicant may be allowed to enter the *the* service on probation, provided there is need for his services and he has passed a satisfactory examination, physical and otherwise.

Medical Examination.

The applicant will report to the Company's Chief, Assistant or Division Surgeon, for a physical examination, before entering the service, report of such examination will be made on this form and sent to head of Department from whom received. It is necessary to make tests for sight and hearing of all persons to be engaged in Train, Engine or Switching Service, as well as physical examination of all persons to be engaged in all grades of service, specified herein.

Age Limits.

All new men employed in Train, Engine or Switching Service must be between Twenty-one and Forty-five years of age. No applicant under Twenty-one years of age will be accepted, excepting as Apprentices in shops and Messengers.

Physical Disabilities which Bar Employment.

Train, Engine and Switching Service.

Loss of eye, leg, arm, more than two fingers, one thumb, great toe; hernia, fits or fainting spells of any character; syphilis, running sores; spinal affections; varicose veins; heart disease; tuberculosis in any form; and alocholism.

Bridge and Buildings Service.

Loss of eye, arm, leg, great toe, more than two fingers; hernia; fits and fainting spells; syphilis, running sores; spinal affections; varicose veins; heart disease; tuberculosis in any form; and alcoholism.

Track, Car and Other Departments.

Loss of eye, arm, leg, more than two fingers; hernia; syphilis, running sores; spinal affections; fits, fainting spells; heart disease, alcoholism and tuberculosis in any form.

19 Dated at Dupo, Ill., on 27 day of Jan. 1910.

Mr. M. B. Mann, Trainmaster, Chester, Ill.

DEAR SIR: I hereby apply for a situation during the pleasure of the above named company as Brakeman or any other service or employment which may be necessary or required from time to time by the Company or my superior officers, and if accepted agree to observe all rules and regulations governing the service to which I may at any time be assigned, to pay my bills promptly each month; to maintain strict integrity of character; to abstain from the use of intoxicating liquors; to avoid saloons and places of low resort, or where liquors are sold; to perform all duties to the best of my ability, and any wages earned by and owing to me, shall not be due and payable until the regular pay day of the Company; and I agree to pay one dollar ($1.00) for the required physical examination providing I pass such examination, and further agree that said sum shall be deducted from my first earnings. I also understand that monthly deductions will be made from my salary for Hospital dues.

I hereby agree, that any untrue or fraudulent statement made by me to the Medical Examiner, or any concealment of facts in this application, shall be considered just cause for dismissal from the service of the Company.

It is also understood and agreed by me that, if my references or work do not prove satisfactory, I am not to be retained.

I was born at Green Hill, State of Tenn., on the 21 day of Oct., 1873. Height 6 feet 00 inches. Weight 170 pounds. Color of eyes Brown. Color of hair Black. Style of beard smooth.

Name of my wife (if none so state) Cordie McWhirter.

Residence, City, St., and No. 1206 Salem Ave., Paducah, Ky.

20 Name of my Father (if dead so state) Dead.

Residence, City, St., and No.....

Name of my Mother (if dead so state) M. A. McWhirter.

Residence, City, St., and No. Mt. Juliet, Wilson Co., Tenn.

Name of my children.....

Residence, City, St., and No. 1206 Salem Ave., Paducah, Ky.

Name of my other relatives (what relation?) (Give names, Residence—City, Street and No.).....

Names and addresses of all persons to whose support I am contributing are as follows:

Cordie McWhirter, wife, of 1206 Salem Street, Paducah, State of Ky.
(Name of City.)

Zoy " Daugh. " " " Ky.
Liade " " " " " "

I have had 5 years' railroad experience on the following named roads: Ill. Cent.

Name of railroad.	Occupation.	On what division, in what yard, or at what station.	Between what dates— From	To
Ill. Cent.	Ass't Ym.	Louisville.	Nov. 1902	Nov. 1905.
" "	Condr.	Tenn.	Jan. 1906	" 1908.
	Switchie	Memphis.	Oct. 1909	Jan. 1910.

Name of Superintendent,
Train Master,
Yard Master or Employer.
A. H. Eagan, Supt.
J. J. Gooen, "
Jous Walch, Y. M.

21 Names and residences of a railroad official and two other responsible persons who will vouch for my good character—A. H. Eagan, Supt., Louisville, Ky., J. J. Givens, Supt., Fulton, Ky.

Have you ever been in the employ of this Company? If so when, where and in what capacity? No.

What was the cause of your leaving the service of this Company? .....

Why did you leave the services of the Company you were last employed with? Act of reduction of force.

Can you see and hear perfectly? Yes. Can you readily distinguish colors? Yes.

(Applicant will here state whether or not he is in any way unsound or deformed in body or limb, or has lost any part of his limbs; if yes, describe same. State whether or not ever injured in any accident; and if yes, give date, location, name of road on which it occurred; nature and extent of injury, and whether entirely recovered; also whether settlement has ever been made, and the consideration for same. If sound in body and limb so state.)

Sound in limb & Body.

Have you ever had litigation with any Railroad Company? No. If so, name of road.....

Have you ever applied to any guarrantee or fidelity company for bond? No. Was the application accepted?——— If rejected, when, where and why?.....

Full name—

EDWARD McWHIRTER, *Applicant.*

Residence 1203 (Number) Salem Ave. (Street) Paducah, Ky. (City)

Witnesses:
JOHN McCAFFREY.
F. B. SHARON.

N. B.—Applicant must in all cases give the required information in his own handwriting, in the presence of and witnessed by the head of the department in which he is to be employed."

Contract.

"1, 27, '10. *190*

Mr. J. R. Wilgus in employ of The Missouri Pacific Railway Company, St. Louis, Iron Mountain & Southern Railway Co. as Gen. Yard Master, has this day informed me of the duties connected with the employment I am about undertaking, viz: that of Brakeman, and has explained to me that the performance of said duties will expose me to great danger, the risk of which I assume for myself; and that I must use proper and constant care to avoid injury to myself and others. I have received a copy of the Time Table containing the printed rules and Regulations of said Railway, with which I am to make myself familiar, and by them and such additions thertof as may be made from time to time, agree to be governed.

And I hereby acknowledge that I have been notified that there are numerous bridges, Buildings, Tunnels, Viaducts, Stock Yard Chutes, Platforms and Coal Chutes and other Obstructions now located and others may be constructed from time to time which will endanger my life and limb, and I agree in consideration of my employment to familiarize myself with same and use due care for my safety without further notice from the Railway Company, and I accept notice from said Railway Company that few, if any, of the aforesaid Buildings or obstructions will clear a man riding on top or side of a car, and that I am to use constant care for my safety in working about same. I also understand and agree that when it is necessary for me to go into the yards of other companies,

23 I must exercise the same care about looking out for obstructions which may be close to track.

I certify, That I am correct and temperate in my habits; that, so far as I am aware, I am now in good health, and have no injury or disease, constitutional or otherwise, except as shown on the accompanying statement made by me to the Medical Examiner, which statement shall constitute a part of this application.

Signature of applicant:

EDWARD McWHIRTER.

Read over in my presence before signing.

Witness:
FRANK B. SHARON.

Occupation—Clerk.

Surgeon's Certificate.

To be filled out and signed after a personal examination by any of the Company's Surgeons, at any of the following desig-

nated points: St. Louis, Jefferson City, Kansas City, Atchison, Concordia, Omaha, Ft. Scott, Osawatomie, Council, Grove, Hoisington, Pueblo, Wichita, Coffeyville, De Soto, Poplar Bluff, Little Rock, Texarkana, Mer Rouge, Wynne, Memphis, Alexandria, Van Buren, and Charleston, Nevada, Mo., Chester, Ill., and Natchez, Miss.

The following is the report of the results of my examination of Mr. Edward McWhirter.

To be signed by applicant in presence of examiner.

1. When placed at a distance of twenty (20) feet from the test types, the last five (5) letters read correctly by the applicant are:

Right eye, 20/20.

Left eye, 20/20.

Both eyes, 20—20.

24 2. The Applicant selects skeins numbered as follows, as being of the same color as test skein A:

Color Azure.

B. The following as being of the same color as test skein B:

....

C. The following as being of the same color as test skein C:

....

3. The applicant hears the tick of a watch with the right ear at 15 inches; with the left ear at 15 inches. For ordinary conversation at a distance of twenty (20) feet, the hearing is..... (expressed in fractions).

I find that there is evidence of recent successful vaccination; that he is not suffering from any disease or disability other than noted, and that he does not menifest any evidence of an abuse of intoxicating liquors.

I hereby certify, that, having examined him for defects of vision, color perception and hearing, and for other physical defects, I find him qualified to fill the position of Brakeman

Disqualifying defects—None.

Defects that do not disqualify—None.

Remarks: .....

....

Examined by

N. O. GREER,
Surgeon at Du Po, Ill.

Date of examination: 1/27, 1910.

To be signed by surgeon making the examination.

25 Said application and Contract is endorsed on the back thereof, as follows; "Filed in open Court Feby. 8, 1911. John R. Kemp, Clk. Thetus McMasters, D. C."

Instruction No. 1 referred to is in words and figures as follows, to-wit:

"The Court instructs the Jury to find for the defendant."

Refused, Feby. 8, 1911."

Instructions A, B and D referred to are in words and figures as follows, to-wit:

"A."

"The Court instructs the jury that if you shall believe from the evidence that the train or locomotive on which the said Etwald McWhirter was employed at the time of the accident that caused his death was engaged in interstate commerce; and, if you shall further believe from the evidence that the said Etwald McWhirter had been required or permitted to be or remain on duty continuously for a longer period than sixteen consecutive hours next before his death, then the defendant assumed the responsibility of any and all of the negligent or wrongful acts of its officers, agents, servants and employés.

Refused, Feby. 8, 1911."

"B."

The Court further instructs the jury that if you shall believe from the evidence that the train or locomotive on which the said Etwald McWhirter was employed at the time of the accident which caused his death was engaged in interstate commerce; and, if you shall further believe from the evidence that he had been required or permitted to be or remain on duty continuously for a longer period than sixteen consecutive hours next before his death, and that any of the officers, agents, servants or employés of the defendant were guilty of negligence, said negligence was the negligence of the defendant and it is liable in damages for the injury and death of the said Etwald McWhirter if his injury and
26 death was occasioned or contributed to by said negligence, and you will find for the plaintiff such damages as you may believe from the evidence she has sustained, not to exceed the sum of $25,000.00.

Refused, Feby. 8, 1911."

"D."

"The Court further instructs the jury that it was the duty of the officers, agents, employees and servants superior in authority to the said Etwald McWhirter to cause the said Etwald McWhirter to be relieved immediately at the expiration of 16 hours after he had remained on duty continuously for 16 consecutive hours.

Refused. Feby. 8, 1911."

Instructions J, Z, and W, referred to are in words and figures as follows, to-wit:

"The Court further instructs the Jury that if they believe from the evidence that at the expiration of the 16 hour law that Wolf Lake was the first place at which the train could go on siding, and it did go on the siding, they should find for the defendant, unless they believe the officers, agents and servants were guilty of negligence as defined in instruction "Z."

Refused."

"Z."

"The Court says to the jury that negligence is the failure to exercise that degree of care which an ordinarily prudent man would exercise in the same or similar business or calling, under similar circumstances.

Refused."

"W."

"The Court instructs the jury that unless they believe from the evidence that Etwal McWhorter came to his death on account of the carelessness and negligence of the officers, agents and
27 servants of the defendant, then the law is for the Defendant and the Jury should so find.

Refused."

Instructions C. E. H. I and X, referred to are in words and figures as follows, to-wit:

"The Court instructs the jury that if you shall believe from the evidence that the train on which the decedent, Etwald McWhirter, was employed at the time of the accident which caused his death, was engaged or employed in interstate commerce; and, if you shall further believe from the evidence that the death of the said Etwald McWhirter resulted from the negligent or wrongful acts of the Conductor, Engineer, or servants of the defendant, superior in authority to the said Etwald McWhirter, you will find for the plaintiff such damages as you may believe from the evidence that she has sustained, not to exceed, however, the sum of $25,000.

Given Feby. 8, 1911."

"E."

"The Court further instructs the Jury that if the train and locomotive on which the decedent, Etwald McWhirter, was employed at the time of the accident which caused his death was engaged in moving, transporting or handling cars, freight or articles of commerce between the states of Missouri and Illinois, or from a point in one of said states to any point in the other, then the said train and locomotive was engaged in interstate commerce.

Given, Feby. 8, 1911."

"H."

"Negligence as used in these instructions is the failure to use such care as a reasonably prudent man would use under like or similar circumstances.

Given Feby. 8, 1911."

28 "I."

The Court further instructs the Jury that if you shall believe from the evidence that the said Etwal McWhorter had been permitted or required to be or remain on duty continuously for more than 16 consecutive hours next before the accident which caused his death,

then the defendant was negligent and liable in damages for said injury and death of Etwal McWhorter, if you shall believe from the evidence that the permitting or requiring the said Etwal McWhorter to be or remain on duty continuously for more than 16 consecutive hours next before his death in any way contributed to the said accident and death, and you will find for the plaintiff such damages as you may believe from the evidence she has sustained by reason of his death, not exceeding the sum of $25,000.00.

Given. Feby. 8, 1911."

"X."

The Court instructs the Jury that unless they believe from the evidence that Etwal McWhorter came to his death on account of the carelessness or negligence of the officers, agents and servants of the defendant or that said McWhorter was permitted or required by the defendant to be on duty more than 16 hours consecutively next before his death, and that his being permitted or required to be on duty more than 16 hours next before his death contributed to his death, the law is for the defendant and the jury should so find.

Given."

And afterwards at the same term and on February, 8, 1911, the defendant, by attorney, entered its motion and filed its reasons for a new trial herein.

The reasons for a new trial referred to are in words and figures as follows, to-wit:

"The defendant moves the Court to arrest the judgment,
29 set aside the verdict, and grant a new trial, for the following reasons, to-wit:

Because the verdict of the Jury is contrary to law, and is not sustained by the evidence.

Because of error in giving and refusing instructions which *was* excepted to at the time.

Because of the error of the Court in refusing to give to the Jury Instruction No. 1 offered by the Defendant at the conclusion of the plaintiff's testimony, and which ruling of the Court was excepted to at the time.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY,
Per E. T. BULLOCK, *Att'y.*"

And afterwards at the same term and on February, 9, 1911, the following proceedings were had herein, to-wit:

"The parties appeared by their attorneys and the motion for a new trial, being fully heard and understood is by the Court, overruled, to which ruling of the Court defendant excepts, and prays an appeal to the Court of Appeals which is granted. It *if* further ordered that the defendant be given until the 12th day of the next term of this Court to file its Bill of Exception herein."

"And afterwards at the same term and on February, 11, 1911, on motion of defendant ordered that the Official Stenographer make both original and carbon copy of the evidence herein and file same in Clerk's Office."

The following depositions were filed herein, to-wit:

"The deposition of H. O. GUESS, which was read on behalf of the plaintiff on the trial of this cause, is in words and figures as follows, to-wit:

Direct examination by E. BOYD, counsel for plaintiff:

30 Question 1. State your name, age, residence and occupation.

Answer 1. H. O. Guess; age thirty-six; residence Dupo, Illinois; occupation locomotive engineer.

Question 2. By whom are you employed as engineer, Mr. Guess?

Answer 2. The St. Louis, Iron Mountain and Southern Railway.

Question 3. How long have you been in the employment of this Company?

Answer 3. As an engineer three years. I have been longer then that as a fireman.

Question 4. Where were you on the 22d day of February last?

Answer 4. I was in Elmo, Missouri.

Question 5. What time were you called out from Elmo on the 22d of February last?

Answer 5. At 3:30 as near as I can remember.

Question 6. Who were the train crew that time out from Elmo at 3:30 on the afternoon of the 22d?

Answer 6. Conductor Loper, flagman Mansker and Brakeman McWhirter and fireman Edmiston.

Question 7. Where was this train going to?

Answer 7. Bush.

Question 8. What State?

Answer 8. Illinois.

Question 9. Is Bush, Illinois, on the main line from Elmo out?

Answer 9. No, it is on a branch out from Gorham to Bush.

Question 10. What time did you arrive in Gorham going up?

Answer 10. I can't say as to that.

Question 11. Did you change from the branch line and proceed to Bush?

Answer 11. Yes, sir.

Question 12. What kind of a train was this?

Answer 12. This going up was empty—nine empties—freight train.

31 Question 13. How long did you stay in Bush?

Answer 13. About an hour. We set out the train of empties — turned the engine. We were there about an hour. It generally takes us about that long.

Question 14. Takes that long to make the transfer at Bush?

Answer 14. Generally about an hour.

Question 15. You came back then to Gorham?

Answer 15. Yes, sir.

Question 16. Proceeded then which way?

Answer 16. South toward Elmo.

Question 17. Where was McWhirter killed, going up or returning?

Answer 17. Returning.

Question 18. At what point?

Answer 18. At Wolf Lake.

Question 19. When?

Answer 19. The morning of the 23rd day of February, at 7:35 as near as I can remember. It was in that neighborhood.

Question 20. How was he killed?

Answer 20. Performing his duty, going out to *get* a switch.

Question 21. Just detail the manner as it occur-ed, as you know it?

Answer 21. As I came into Wolf Lake, when I whistled for town brakeman asked me if I were going to head in at Wolf Lake. I told him yes, that we had to get in on account of the sixteen hour law. He got up, went out at the front window on the left side of the engine along the foot board, and the next thing I seen was the operator at Wolf Lake very much excited in giving a stop signal. I stepped off of engine, asked him what was the matter. He said, "My Goodness, you have run over the brakeman." I went looking for him, found him under the left tank wheel cut in two.

32 Question 22. The brakeman referred to here was whom?

Answer 22. McWhirter.

Question 23. How was your train known, by what name?

Answer 23. Extra South 503.

Question 24. Did you know this brakeman was in front of the engine?

Answer 24. No, sir.

Question 25. Did you see him go out of the cab window?

Answer 25. I seen him go out of the cab window. That is all.

Question 26. What did you suppose he went out of the cab window for?

Answer 26. He is suppose- to get out there to open the switch. I suppose that is what he went out there for.

Question 27. Was it his duty to throw the switch in front of the window or not?

Answer 27. No, sir, it wasn't his place to throw it in front of the window. He wasn't supposed to go out on that pilot.

Question 28. What I mean is was the switch that the brakeman was required to throw in front of the engine or behind *of* the engine?

Answer 28. It was in front of the engine.

Question 29. Have you any record that would show the minute that the train arrived at Wolf Lake on the morning of the 23d?

Answer 29. No, sir, I have no record at all.

Question 30. You testified before the coroner's jury, did you not?

Answer 30. Yes, sir.

Question 31. Do you remember what time you stated at the Coroner's inquest that the train arrived at Wolf Lake?

Answer 31. As near as I can remember, it was 7:35.

Question 32. 7:35 would make you how long over the
33 sixteen hour law?

Answer 32. Five minutes.

Question 33. You stated before the coroner's inquest "at 7:30 the sixteen hour law was up. We were seven minutes over time." Was that correct?

Answer 33. I suppose so. As near as I can remember it was five minutes. It was 7:35. If I said 7:37 that was correct. Then I knew it. It has been over a year ago now.

Question 34. Which cylinder on your engine was leaking steam?

Answer 34. Neither one of them bad, more than ordinarily. It wouldn't make any difference in this case.

Question 35. But one of the cylinders on your engine was leaking steam, was it not?

Answer 35. It was not.

Question 36. Do you mean that neither cylinder on engine 503 were leaking steam on the morning of the 23d of February, 1910, and at the time Etwal McWhirter was killed?

Answer 36. I mean they were not. I was not working steam when he was killed. The engine was drifting. Understand shut off, there would be no leak there.

Question 37. And neither cylinder had been leaking steam that morning?

Answer 37. No.

Question 38. Had anything been the matter with the engine on this return trip?

Answer 38. No, nothing at all.

Question 39. Who saw this man run over?

Answer 39. Mr. Roberson was the only man I can say. He was standing on the platform.

Question 40. Mr. Fred Roberson?

Answer 40. Yes, sir.

Question 41. Where was this train going to at the time Mc-
34 Whirter was killed?

Answer 41. It was going out to Wolf Lake. Destination was Elmo.

Question 42. When did the train proceed on the balance of its trip?

Answer 42. When there was another crew that come to relieve us at Wolf Lake.

Question 43. The same crew did not proceed?

Answer 43. No, sir.

Cross-examination by Judge E. T. BULLOCK, counsel for defendant:

Question 1. State whether or not McWhirter knew of the purpose of the train going to head in at Wolf Lake——

Objected to by counsel for plaintiff because of his stating something not within his knowledge.

Judge BULLOCK: And if so, state why he knew it?
Answer 1. Because I told him we were going to head in.
Question 2. Did you tell him for what purpose.
Answer 2. Yes, sir.

Objected to by counsel for plaintiff.

Question 3. What did you tell him?
Answer 3. That we were going to head in for the sixteen hour law.
Question 4. At the expiration of the sixteen hour law, what was the first place or switch that you could enter?
Answer 4. Wolf Lake.
Question 5. Was the throwing of the switch in front of the engine a part of Mr. McWhirter's duty as brakeman?
Answer 5. Yes, sir, it was.
Question 6. When was the first time that you knew of this
35 unfortunate accident?
Answer 6. When Mr. Roberson told me what had happened.
Question 7. Whom do you mean by Mr. Roberson, who was he?
Answer 7. The telegraph operator at Wolf Lake.

Redirect examination by Mr. E. BOYD, counsel for plaintiff:

Question 1. How far is it, Mr. Guess, from Wolf Lake to Gorham?
Answer 1. Well, I don't know just exactly the number of miles.
Question 2. About how far?
Answer 2. It is in the neighborhood of fifteen miles, as near as I can remember.
Question 3. How far is it from Wolf Lake to Howardtown?
Answer 3. Six miles, about six miles.
Question 4. Wasn't there a switch at Howardtown?
Answer 4. Yes, sir.

Redirect examination by Judge E. T. BULLOCK, counsel for defendant:

Question —. Say whether or not the pilot step was in any way defective?
Answer 1. They were not.
Question 2. Do you know anything about how this accident happened, except from the fact that the telegraph operator told you that something was wrong?
Answer 2. I do not.

H. O. GUESS.

Also the deposition of F. A. ROBERSON, which was read on
36 behalf of the plaintiff on the trial of this case, and which is in words and figures as follows, to-wit:

Direct examination by E. BOYD, counsel for plaintiff:

Question 1. State your name, age, residence and occupation?
Answer 1. F. A. Roberson; twenty-three years old; residence Wolf Lake; telegraph operator.
Question 2. You are employed by whom as telegraph operator?
Answer 2. St. Louis, Iron Mountain and Southern Railway Company.
Question 3. How long have you been so employed?
Answer 3. Since July, 1904.
Question 4. Where were you stationed as operator on the 22d day of February, 1910?
Answer 4. Wolf Lake, Illinois.
Question 5. Were you at the station in the morning of the 23d when extra train No. 503 came into Wolf Lake from the North?
Answer 5. I was.
Question 6. Did you see the train when it pulled in?
Answer 6. I did.
Question 7. What time did it pull into Wolf Lake?
Answer 7. It was about 7:37, as well as I recollect, by the time they got to the depot.
Question 8. Just tell what you know about the accident that happened at Wolf Lake on that morning?
Answer 8. As I was sweeping out the office I heard an engine coming. I looked out of the window and saw it was an extra south—saw it was a train coming south—didn't know it was
37 an extra. I seen they were stopping and I wondered what they were stopping for and went ahead sweeping. When they came in closer to the office I went out and was standing on the platform. I saw a man leave the cab window and come down the left running board and came down to the pilot, and as it was nearing the switch he left the pilot and struck the ground running and the next I saw he fell face downward between the rails. I next saw him on his hands and knees. After that I turned my eyes to the engineer and did not see him any more, giving the engineer a stop signal. When he came to a stop I told the engineer something, but I do not remember what I told him, but that was the last I saw of the brakeman until he was taken from under the tender of the engine.
Question 9. Was this brakeman McWhirter?
Answer 9. As far as I know.
Question 10. It was the brakeman on extra 503?
Answer 10. It was the brakeman on extra 503, yes, sir.
Question 11. Was he dead when he was taken out from under the engine?
Answer 11. Yes, sir.
Question 12. What kind of weather was this, Mr. Roberson?
Answer 12. Pretty cold—weather chilly, cold.

Question 13. Ground frozen?

Answer 13. As well as I can remember it was.

Question 14. Any ice and sleet on the ground?

Answer 14. Not that I remember.

Question 15. Do you know how come this man to fall?

Answer 15. I do not.

Question 16. What was the condition of the road *be* there where he was?

38 Answer 16. There was cinders between the rails.

Question 17. Wasn't there a pile of ashes or cinders piled up between the rails much higher than the other ground about the place he was killed?

Answer 17. Little higher, yes, sir, ashes between the rails.

Question 18. That was frozen?

Answer 18. Yes, sir, I believe they were.

Question 19. To refresh your recollection, Mr. Roberson, I will ask you if it was not a fact that it had been raining on the night of the 22d which had turned to a kind of sleet and had frozen up?

Answer 19. Not that I recollect, because I didn't go to work until one o'clock of the 23d. I don't know whether it rained the night of the 22d, not that I remember of it raining.

Question 20. What time did this train proceed from Wolf Lake?

Answer 20. I do not remember, I was off duty at ten o'clock.

Question 21. Did anyone else see McWhirter at the time he was killed?

Answer 21. I think not. Not at the office.

Question 22. Was there anyone else around there except the train crew on this freight train?

Answer 23. Not at the present time.

Cross-examination by Judge E. T. BULLOCK, counsel for defendant:

Question 1. When you saw McWhirter's perilous condition you say you turned your head. Why did you do that?

Answer 1. I don't remember saying I turned my head. I turned my eyes from the brakeman to the engineer.

39 Question 2. Did you know then that he was in a condition to being hurt?

Answer 2. I didn't positively know so, but I thought he was in a dangerous condition down there.

Question 3. How far did the train run before the engineer stopped it after you notified him of this trouble?

Answer 3. I suppose about the length of an engine. Maybe not quite so far, maybe a little further. I don't remember.

Question 4. Do I understand you to say that Mr. McWhirter left the engine, passed down over the pilot and was out on the ground when you saw him?

Answer 4. He was on the ground when I saw him.

Question 5. How far was he from in front of that engine when he fell?

Answer 5. That is pretty hard for me to judge because he was in line of the engine and myself.

Question 6. How far was it from where he fell to the switch which he was called on to turn?

Answer 6. Perhaps three or four car lengths, maybe not so far.

Question 7. How far is a car length—how many feet?

Answer 7. That is pretty hard for me to say.

Question 8. How long is a car?

Answer 8. Well, the ordinary run thirty-six feet, some of them thirty, some of them forty.

Question 9. Now, when you saw him fall how far was he from this switch?

Answer 9. About three car lengths. About three car lengths.

Redirect examination by Mr. E. Boyd, counsel for plaintiff:

40 Question 1. You say that at the time McWhirter fell he was in line with you and the engine. Explain what you mean by that?

Answer 1. In direct with me—between where I stood and where he got off, putting me in direct line with him and where he got off. I can't tell whether he was ten, twenty or how far he was from the engine.

Question 2. You mean, if I understand you, that the train was coming towards you and he stepped off between you and the engine, is that correct?

Answer 2. That is correct.

Question 3. Do you know whether or not the cylinder heads of this engine were leaking?

Answer 3. I couldn't say whether it was the cylinder heads or not. I recollect there was some steam or other from the engine.

Question 4. Steam was escaping?

Answer 4. Steam was escaping from the engine, as well as I recollect.

Cross-examination by Judge E. T. Bullock, counsel for defendant:

Question —. Do you know what caused that?

Answer 1. I do not.

F. A. ROBERSON.

Also the deposition of G. C. Loper, which was read as evidence on behalf of the plaintiff on the trial of this action, and which is in words and figures as follows, to-wit:

Direct examination by E. Boyd, counsel for plaintiff:

41 Question 1. State your name, age, residence and occupation.

Answer 1. G. C. Loper; age thirty-two years; residence East St. Louis, Illinois; occupation conductor on the St. Louis, Iron Mountain and Southern Railway.

Question 2. How long have you been a conductor for the St. Louis, Iron Mountain and Southern Railway Company?
Answer 2. Two years.
Question 3. Where were you on the 22d day of February, 1910?
Answer 3. I was in Elmo, Missouri.
Question 4. Were you called out that day?
Answer 4. Yes, sir.
Question 5. What time?
Answer 5. At 5:30 P. M.
Question 6. Where did you go?
Answer 6. Went to Bush, Illinois, and started to return to Elmo.
Question 7. Were you conductor on the train known as extra 503?
Answer 7. Yes, sir.
Question 8. What time did you get to Bush, Illinois?
Answer 8. I think it was 11:30 P. M. on the 22d.
Question 9. Return immediately?
Answer 9. No, we were there an hour and thirty minutes.
Question 10. Where did you strike the main line?
Answer 10. At Gorham, Illinois.
Question 11. Which way did you proceed from Gorham?
Answer 11. South toward Elmo, Missouri.
Question 12. Who was flagman on this train?
Answer 12. H. A. Mansker.
Question 13. Who was the brakeman?
42 Answer 13. Why E. McWhirter.
Question 14. What time did you get into Wolf Lake?
Answer 14. Arrived there at 7:37 A. M.
Question 15. What happened to McWhirter at that place?
Answer 15. He was run over at this place.
Question 16. Did you see it?
Answer 16. No, sir.
Question 17. Where were you at the time he was killed?
Answer 17. In the caboose.
Question 18. How was McWhirter injured?
Answer 18. He was run over. That is all I know. He was killed.
Question 19. Do you remember what kind of weather the night of the 22d was?
Answer 19. Why, it was a cold night.
Question 20. Freezing?
Answer 20. Yes, sir.
Question 21. Was the morning of the 23d cold?
Answer 21. Yes, sir.
Question 22. Was the ground frozen?
Answer 22. Yes, sir.
Question 23. Who informed you that McWhirter had been killed at Wolf Lake?
Answer 23. The engineer, Mr. Guess.
Question 24. What kind of a train did you have on your return trip south?
Answer 24. We had a train of coal.
Question 25. How far is it from Wolf Lake to Gorham?
Answer 25. Fifteen miles.

Question 26. How far is it from Wolf Lake to Howardtown?

43 Answer 26. About six or seven miles.

Question 27. Which way is Howardtown from Wolf Lake?

Answer 27. North.

Question 28. Between Gorham and Wolf Lake?

Answer 28. Yes, sir.

Question 29. What time did you proceed from Wolf Lake with your train?

Answer 29. Well, I didn't proceed from there. I was relieved there.

Question 30. You mean another crew was put in charge of the train?

Answer 30. Yes, sir.

Question 31. Do you know anything about how the accident happened in which Mr. McWhirter was killed?

Answer 31. No, sir.

Question 32. Had you had any trouble with your engine on that trip?

Answer 32. No, sir.

Question 33. Do you know who saw this accident?

Answer 33. Why, Fred Roberson says he seen it.

Question 34. Anyone else?

Answer 34. Nobody else that I know of.

Cross-examination by Judge E. T. BULLOCK, counsel for defendant:

Question 1. Had you discovered anything wrong with your engine or train at all up to that time?

Answer 1. No, sir.

Question 2. How far were you from Wolf Lake at the expiration of the sixteen hour limit?

Answer 2. Well, probably about two miles, you couldn't tell.

44 Question 3. Was that the first switch at the expiration of that limit?

Answer 3. Yes, sir.

Question 4. You went in there?

Answer 4. Yes, sir.

Question 5. You never knew or heard of anything wrong with your train at all?

Answer 5. No, sir.

Objected to by counsel for plaintiff.

Question 6. Say whether or not it is the duty of the brakeman to go ahead and throw the switch as at Wolf Lake to let the train in—if that is part of his duty?

Answer 6. It is his duty to throw the switch.

Question 7. To throw the switch?

Answer 7. Yes, sir.

Question 8. How fast was that train going at the time this accident happened?

Answer 8. It couldn't have been going *moer* than two miles an hour because they stopped at an engine's length.

Question 9. If I understand you, you were simply to go into this siding to tie up and quit on account of the sixteen hour law?

Answer 9. That was the cause of our going in there.

Question 10. You didn't see the accident, did you?

A. No, sir.

Redirect examination by E. BOYD, counsel for plaintiff:

Question 1. Do you know when he was killed—when McWhirter was killed?

45 Answer 1. About the time we arrived there—about 7:37 to the best of my memory.

Question 2. Where did you say you were?

Answer 2. In the caboose.

Question 3. How could you tell the speed your train was going at the time McWhirter was killed if you don't know when he was killed?

Answer 3. Well, you could tell that by the space you went after the accident occurred.

Question 4. You went how far?

Answer 4. About an engine's length, or car length, in other words practically the same.

Question 5. Do you mean you went about a car length over the body?

Answer 5. Yes, sir.

Question 6. Do you know how far he was in front of the engine at the time he fell?

Answer 6. No, sir.

Question 7. All you know about the distance you went then, if I understand you, is that you passed over the body about a car length?

Answer 7. Yes, sir.

Question 8. State again now in feet how far the front wheels of the engine passed over the body of McWhirter.

Answer 8. Well, about thirty-six or forty feet, I should judge.

Question 9. Is there a switch at Howardtown?

Answer 9. Yes, sir.

Question 10. Was there not considerable ice on the ground that morning?

Answer 10. I don't think there was. It was a cold frosty

46 morning.

Question 11. Had it rained any on the night before?

Answer 11. I don't think that it had, not that I remember.

Question 12. To refresh your recollection, hadn't it rained a little and turn to a kind of sleet sometimes during the night?

Answer 12. No, sir, I don't think so.

G. C. LOPER."

"Supersedeas Bond."

"Whereas, the appellant, the St. Louis, Iron Mountain and Southern Railway Company, *have* taken an appeal from a judgment of the Hickman Circuit Court, rendered at its February Term, 1911, against it in favor of the Appellee, Cordie McWhirter, for $3,000.00, and cost and the Appellant desires to supersede said judgment.

Now we, —— ——, —— ——, hereby covenant to and with the Appellee, Cordie McWhirter, that the Appellant will pay to the Appellee, Cordie McWhirter, all cost and damages that the Appellant — on the appeal, also that it will satisfy and perform the said judgment if it should be affirmed, and any order or judgment which the Court of Appeals may render or order to be rendered by the inferior Court not exceeding in amount the original judgment.

Witness our hands this 28th day of February, 1911.

THE UNITED STATES FIDELITY AND GUARANTY COM' ANY,
By J. M. KEMP, *Attorney-in-Fact.*

Attest:
JNO. R. KEMP,
C. H. C. C."

47 Said bond is endorsed on the back thereof as follows, to-wit: "Filed in Clerk's Office and Supers. and copy issued. Feb'y 28, 1911. Jno. R. Kemp, Cl'k."

The following schedule was filed herein, to-wit.

"The Clerk is directed, for the purpose of this appeal, to copy the petition and amended petition of the plaintiff.

To copy the petition of the defendant to move this case to the Federal Court, and the bond.

To copy the answer, and amended answer of the defendant, and copy reply to answer and amended answer.

And copy all exhibits referred to in any of the pleadings.

And copy reasons for a new trial, and all orders, made in the case.

And the depositions of witnesses."

Said Schedule is endorsed on the back thereof as follows, to-wit: "Filed in Clerk's Office. Mch. 3, 1911. Jno. R. Kemp, Cl'k."

Agreement.

"It is agreed between Eaton & Boyd, Attorneys for Mrs. Cordie McWhirter, and E. T. Bullock, Attorney for the St. L. I. M. & S. Ry. Co., that the bill of evidence called bill of Exception No. 1, is a correct copy of all of the evidence introduced on the trial in this case, together with all exceptions and objections and rulings of the Court thereon.

And it is agreed that the bill of exceptions No. 2, contains all the

instructions asked for by the plaintiff and refused by the Court, also all the instructions asked for by the defendant and refused by the Court.

48 Also all the instructions given by the Court on its own motion, and to the giving of which both plaintiff and defendant excepted at the time.

And also contains the reasons for a new trial filed by the defendant, and action of the Court thereon, and exceptions, and verdict of the jury.

And it is agreed that both of these bills of exceptions may be signed by special Judge, Sam E. Jones, who presided at the trial, as the true bill of evidence and bill of exceptions.

This March, 10, 1911.

EATON & BOYD,
Att'ys for Mrs. Cordie McWhirter.
E. T. BULLOCK,
Att'y for St. L., I. M. & S. R. R. Co."

Said Agreement is endorsed on the back thereof as follows: "Filed in Clerk's Office. Mch. 14, 1911. Jno. R. Kemp, Cl'k."

Bill of Exceptions No. 2.

"Be it remembered that at the conclusion of the plaintiff's testimony, the defendant move- the Court to give to the Jury instruction No. 1, which is in words and figures as follows:

"The Court instructs the Jury to find for the defendant." To which instruction the plaintiff objected and the objection was sustained, and the Court refused to give said instruction, to which defendant excepted at the time and still excepts.

49 And be it further remembered that, at the conclusion of all the testimony, the plaintiff moved the Court to give to the jury instruction A, which is in words and figures as follows:

"The Court instructs the jury that, if you shall believe from the evidence that the train or locomotive on which the said Etwal McWhirter was employed, at the time of the accident that caused his death, was engaged in interstate commerce; and if you shall further believe from the evidence that the said Etwal McWhirter had been required or permitted to be or remain on duty continuously for a longer period of time then 16 consecutive hours before his death, then the defendant assumed the responsibility of any and all other negligence or wrongful acts of its officers, agents, servants and employés." To the giving of which instruction the defendant objected, and said objections were, by the Court, sustained and instructions refused, to which the plaintiff excepted and still excepts.

And be it further remembered that, the plaintiff offered instruction B, which is in words and figures as follows;

The Court instructs the jury that if you shall believe from the evidence that the train or locomotive, on which the said Etwal McWhirter was employed at the time of his death, was engaged in interstate commerce; And if you shall further believe, from the evi-

dence, that he had been required or permitted to be, or remain on duty continuously for a longer period than sixteen consecutive hours before his death, and that any of the officers, agents, servants or employés of the defendant were guilty of negligence, said negligence was the negligence of the defendant, and it is liable in
50 damages for the injury or death of the said Etwal McWhirter, and if his injury or death was occasioned or contributed to by said negligence, *and* you will find for the plaintiff such damages as you may believe from the evidence she has sustained, not to exceed the sum of $25,000.00." To the giving of which the defendant objected and the Court sustained objections and refused to give said instructions, to which ruling of the Court the plaintiff excepted at the time, and still excepts.

Be it remembered that the plaintiff then moved the Court to give to the jury instruction D, which is in words and figures as follows;

"The Court further instructs the Jury that it was the duty of the officers, agents, employees and servants superior, in authority, to the said Etwal McWhirter, to cause the said Etwal McWhirter to be relieved immediately at the expiration of sixteen hours after he had remained on duty continuously for sixteen consecutive hours," to the giving of which the defendant objected and the Court sustained the objection, and refused to give said instruction, to which the plaintiff excepted at the time, and still excepts.

And be it further remembered that the plaintiff then moved the Court to give to the jury instruction F, which is in words and figures as follows;

"The Court further instructs the jury that the decedent, Etwal McWhirter, was injured and killed by the defendant while in the discharge of his duty, and was not negligent." To the giving of which the defendant objected, and the Court sustained said objections and refused to give said instructions, to which ruling of the Court the plaintiff excepted at the time, and still excepts.

And be it further remembered that the plaintiff moved the
51 Court to give to the jury instruction G, which is in words and figures as follows;

"The Court further instructs the jury that if you shall believe from the evidence that the said Etwal McWhirter had been permitted, or required, to be or remain on duty continuously for more than sixteen consecutive hours next before the accident which caused his death, then the defendant was negligent and liable in damages for the injury and death of the said Etwal McWhirter, and you will find for the plaintiff such damages as you may believe from the evidence she has sustained, not to exceed the sum of $25,000.00."

To the giving of which instruction the defendant objected and the Court sustained said objections, and refused to give said instructions, to which ruling of the Court the plaintiff *excepts* at the time, and still excepts.

And be it further remembered that the defendant offered instruction No. 1, which is in words and figures as follows;

"The Court instructs the jury to find for the defendant". And

the plaintiff objected to said instruction and the Court sustained said objection, and refused to give said instruction, to which ruling of the Court the defendant excepted at the time, and still excepts.

Be it further remembered that the defendant offered instruction W, which is in words and figures as follows;

"The Court instructs the jury that unless they believe from the evidence that Etwal McWhirter came to his death on account of the carelessness or negligence of the officers, agents, and servants of the defendant, then the law is for the defendant, and the
52 jury should so find." To the giving of which the plaintiff objected, and the objection was sustained by the Court, and the Court refused to give said instruction, to which ruling of the Court the defendant excepted at the time, and still excepts.

And be it further remembered that the defendant moved the Court to give to the jury instruction Y, which is in words and figures as follows;

"The Court instructs the jury that if they believe from the evidence that, at the expiration of the sixteen hour law, that Wolf Lake, Ill., was the first place at which the train could go on a siding, and it did so go on a siding, they should find for the defendant; unless they believe the officers, agents and servants were guilty of negligence as defined in instruction Z," to the giving of which the plaintiff objected and the Court sustained said objection, and refused to give said instruction, to which ruling of the Court defendant excepted at the time, and still excepts.

And be it further remembered that the defendant moved the Court to give to the jury instruction Z, which is in words and figures as follows;

"The Court says to the jury that negligence is the failure to exercise that degree of care which an ordinarily prudent man would exercise in the same, or similar, business or calling, or under similar circumstances." To the giving of which plaintiff objected and the Court sustained the objection, and refused to give said instruction, to which ruling of the Court the defendant excepted, and still excepts.

And be it further remembered that the Court, on motion of plaintiff, gave to the jury instruction C, which is in words and figures as follows;

53 "The Court instructs the jury that if you shall believe from the evidence that the train on which the decedent, Etwal McWhirter, was employed at the time of the accident which caused his death, was engaged, or employed, in interstate commerce, and if you shall further believe from the evidence that the death of the said Etwal McWhirter resulted from the negligent and wrongful acts of the conductor, engineer, or servants of the defendant, superior in authority to the said Etwal McWhirter, you will find for the plaintiff such damages as you may believe from the evidence that she has sustained, not to exceed, however, the sum of $25,000.00."

And be it further remembered that the Court, on motion of plain-

tiff, gave to the jury instruction I, which is in words and figures as follows:

"The Court further instructs the jury that if you shall believe from the evidence that the said Etwal McWhirter had been permitted, or required, to be, or remain, on duty continuously for more than sixteen consecutive hours next before the accident, which caused his death, then the defendant was negligent, and liable in damages for said injury and death of Etwal McWhirter, if you shall believe from the evidence that the permitting or requiring the said Etwal McWhirter to be, or remain, on duty continuously for more than sixteen consecutive hours next before his death, in any way contributed to the said accident and death, you will find for the plaintiff such damages as you may believe, from the evidence, she has sustained by reason of his death, not to exceed the sum of $25,000.00."

And be it further remembered that, on motion of plaintiff,
54 the Court gave to the jury instruction H, which is in words and figures as follows:

"Negligence as used in these instructions is the failure to use such care as a reasonably prudent man would use under like or similar circumstances."

And be it further remembered that the Court, on its own motion, gave to the jury instruction X, which is in words and figures as follows:

"The Court instructs the jury that unless they believe from the evidence that Etwal McWhirter came to his death on account of the carelessness and negligence of the officers, agents and servants of the defendant, or that the said Etwal McWhirter was permitted, or required, by the defendant to be on duty more than sixteen consecutive hours next before his death, and that his being permitted or required to be on duty more than sixteen hours next before his death contributed to his death, the law is for the defendant and the jury should so find."

To the giving of said instructions C, E, H, and I, the defendant excepted at the time, and still excepts. To the giving of instruction X both plaintiff and defendant excepted at the time, and still excepts.

And the jury returned into the Court the following verdict:

"We *of* the jury find for the plaintiff in the sum of $3000.00.

"M. P. GORE,
"One of the Jury."

And be it further remembered that on the 8th day of Feb., 1911, the defendant filed its reasons and moved the Court for a new trial herein, and which reasons are in words and figures as follows:

55 Hickman Circuit Court.

CORDIE MCWHIRTER, Plaintiff,
vs.
ST. L., I. M. & S. RY. CO., Defendant.

Reasons for a New Trial.

The defendant moves the Court to arrest the judgment, set aside the verdict, and grant a new trial, for the following reasons:

Because the verdict of the jury is contrary to law, and is not sustained by the evidence.

Because of error in giving and refusing instructions, which *was* excepted to at the time.

Because of error of the Court in refusing to give to the jury instruction No. 1, offered by the defendant at the conclusion of the plaintiff's testimony, and to which ruling of the Court the defendant excepted at the time and still excepts.

ST. L., I. M. & S. RY. CO.,
By E. T. BULLOCK, *Defendant.*

And the Court overruled said motion for a new trial, to which ruling of the Court the defendant objected and excepted at the time, and still objects and excepts.

SAM E. JONES,
Special Judge Hickman Circuit Court.

56 STATE OF KENTUCKY,
County of Hickman:

I, John R. Kemp, Clerk of the Hickman Circuit Court, in and for the County and State aforesaid, do certify that the foregoing is a complete record of the case therein set up, and full and complete as the same remains of record in my Office.

Given under my hand as Clerk of said Court, this the 16th day of March, 1911.

JNO. R. KEMP, *Clerk,*
By T. McMASTERS, *D. C.*

57 & 58 And with said transcript there was filed a Transcript of Testimony, which is in words and figures as follows:

Be it remembered that upon the trial of this case the plaintiff, Mrs. CORDIE MCWHIRTER, was introduced as a witness in her behalf, who, being first duly sworn, testified as follows, to-wit:

Examination in chief.

Hon. E. A. BOYD:

Q. What is your name?
A. Cordie McWhirter.
Q. Are you the Administrator of the estate of Elvin McWhirter, deceased?
A. Yes sir.
Q. Are you the surviving wife of Elvin McWhirter?
A. Yes sir.
Q. How many children did Mr. McWhirter leave?
A. Four.
Q. What are their ages?
A. Thirteen (13), ten (10), seven (7), and five (5).
Q. What was Mr. McWhirter's age at the time of his death?
A. Thirty-six (36).
Q. Where was he killed?
A. At Wolf Lake, Illinois.
Q. What was his earning capacity at the time of his death?
A. From One Hundred to One Hundred and Twenty Five Dollars per month.
Q. How long had he been engaged in the railroad business?
A. With the Iron Mountain?
Q. Any railroad business?
A. Thirteen years.

59 Cross-examined.

Hon. E. T. BULLOCK:

Q. Your husband was killed, you say, at Wolf Lake, Illinois?
A. Yes sir.
Q. Was he then in the employ of the Iron Mountain?
A. Yes sir.
Q. In what capacity?
A. Brakeman and flagman.
Q. You know nothing of the particulars, do you?
A. No sir.

Be it also remembered that upon the trial of this case the Plaintiff by attorney then read the deposition of Mr. H. O. Guess, taken in the city of Cairo, Alexander County, Illinois, on the 2nd day of January, 1911, which deposition is in words and figures as follows, to-wit:

(The Clerk will here insert.)

Cross-Examination of this witness read by Hon. E. T. Bullock:

Be it also remembered that the Plaintiff by attorney next read the deposition of Mr. F. A. Robertson, the cross examination of which was read by Hon. E. T. Bullock.

(The Clerk will here insert.)

Be it also remembered that upon the trial of this case Mr. A. E. BOYD was next introduced as a witness on behalf of the Plaintiff, who, being first duly sworn, testified as follows, to-wit:

Examination in chief.

Hon. W. V. EATON:

60 Q. You are one of the attorneys for the plaintiff in this case?

A. Yes sir.

Q. After you were employed as attorney in this case did you visit or inspect the place where this accident occurred?

A. Yes, I did.

Q. You just explain in your own way the place where this accident occurred?

Counsel for the defendant objects to this because the place referred to might have changed conditions before Mr. Boyd saw it.

By the COURT: Yes, unless it was in the same condition it was in at the time of his death.

Objections Sustained.

Exceptions by the Plaintiff.

Q. In which direction from the station, or telegraph office, at Wolf Lake, was the place of this accident?

A. It was north.

Q. About how far?

A. As well as I remember about one hundred and fifty (150) yards.

Q. Have you been over the line of road since this accident between the town of Gorram and this station, Wolf Lake?

A. Yes, I have passed all up that road.

Q. You know where there is a place called Howerton?

A. Yes sir.

Q. What direction is that from Wolf Lake?

A. North.

Q. Is that not between Wolf Lake and Gorram?

A. I think it is.

Q. How far from Wolf Lake?

A. About six miles.

61 Be it remembered that at this juncture the Plaintiff desires to offer Life Table No. 2 of the Kentucky Statutes as evidence, and asked that same might be considered read to the jury.

Granted by the Court.

Be it also remembered that the Plaintiff offered as evidence Section No. 2 of Chapter 2939 (S. 5133) of the United States Compiled Statutes, Act of March the 4th, 1909, entitled "An Act to Promote the Safety of Employees and Travelers Upon Railroads by Limiting the Hours of Service of Employees Thereon," (34 Stat. 1414), and asked that same might be considered read to the jury.

Granted by the Court.

Defendant begins.

Be it also remembered that upon the trial of this case the Defendant introduced as a witness in its behalf and had sworn Mr. ROPER who testified as follows, to-wit:

Examination in chief.

Hon. E. T. BULLOCK:

Q. What business were you engaged in on the 22" day of February, 1910?
A. Railroad Conductor.
Q. How long had you been engaged in the railroad business, Mr. Roper?
A. Since 1901.
Q. What was the number of the engine that was pulling your train and where were you going on the 23" day of February,—but in the first place, do you remember the time that Mr. McWhirter was killed?
A. Yes sir.
Q. Say whether or not he was your flagman?
62 A. Yes sir, he was.
Q. What was the number of the engine pulling your train that day?
A. Engine 503.
Q. Where were you going?
A. To Bush.
Q. Where did this accident happen?
A. At Wolf Lake, Illinois.
Q. How far is Wolf Lake from Bush?
A. About thirty-five (35) miles, I think.
Q. Who was your engineer?
A. Guess.
Q. And I believe you state that McWhirter was your brakeman?
A. Yes sir.
Q. Do you know anything about the accident, how it happened?
A. No sir.
Q. Where were you?
A. In the caboose.
Q. What were you going into this Wolf Lake for, what was the occasion of your going in there?

Objections by the Plaintiff.
Overruled by the Court.
Exceptions by the Plaintiff.

A. On account of the sixteen-hour law.
Q. Now tell the jury how far it is from Gorram to Wolf Lake.
A. It is about fifteen miles.
Q. How far is it from Howerton?
A. About six or seven miles.
Q. Seven miles; now where were you as to the track, where was your train as to the track when you say you started in there for the sixteen-hour law?

Objections by the Plaintiff.

63 Q. Where was your train?

Objections by the Plaintiff.
Overruled by the Court.
Exceptions by the Plaintiff.

A. Just beyond the station.
Q. Was there any switch or siding this side of Wolf Lake into which you could go? Was that the first siding?
A. Yes sir.
Q. And you went in there?
A. Yes sir.
Q. I believe you said you knew nothing of the accident?
A. No.
Q. Are you acquainted with Mr. Robertson?
A. Yes sir.
Q. What was his business at that time?
A. Telegraph Operator.
Q. At what place?
A. Wolf Lake.
Q. What kind of train did you have?
A. Had a train of coal.
Q. When you got to this place, Wolf Lake, did your crew proceed on with the train, or were you relieved?

Objections by the Plaintiff.
Overruled by the Court.
Exceptions by the Plaintiff.

A. Were relieved.
Q. Was that the end of your run?
A. It is on account of the 16-hour law.
Q. Do you know about the time that that train arrived at Wolf Lake station?
A. At seven thirty-seven (7:37) A. M.

64 Cross-examined.

Hon. A. E. Boyd:

Q. Where is Ilmo?
A. In Missouri.
Q. Where is Bush?
A. In Illinois.
Q. Where did you change from the main line?
A. At Gorram.
Q. Is there a switch at Howerton?
A. Yes sir.
Q. How fast was this train going at the time of this accident?
A. About three or four miles an hour.

Be it further remembered that at this juncture and after defendant had closed the case the Defendant asks that the pleadings in this case be considered as evidence, also contract of employment, &c., to which the Plaintiff Objects.

The Court sustained the objections of the Plaintiff, to which ruling of the Court the Defendant excepts.

Be it also remembered that the Defendant then asked the Court that the contract of engagement be considered as evidence and read to the jury, to which the Plaintiff objects.

The Court sustained the objections of the Plaintiff, to which ruling of the Court the Defendant excepts.

Evidence closes.

65 I, Cora Morehead, Official Stenographer for the Hickman Circuit Court, do certify that the foregoing transcript is a true and correct copy of all of the evidence introduced and heard, and offered to be introduced and rejected, and all exceptions, objections and avowals concerning same, as well as all papers and exhibits offered to be or used as evidence in the trial.

Witness my hand, this the 17" day of February, 1911.

CORA MOREHEAD,
Official Stenographer, Hickman Circuit Court.

Examined and approved;

SAMUEL E. JONES,
Special Judge.

And with said transcript there was also filed a statement which is in words and figures as follows, to-wit:

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILROAD COMPANY,
Appellant,
vs.
MRS. CORDIE MCWHIRTER, Administratrix, Appellee.

Statement.

The judgment appealed from may be found on page 16 of record and *and* was rendered on the 8th day of February, 1911.

No summons or warning order is desired as the appeal was granted by the Court below.

EATON & BOYD,
Att'ys for Appellee, Paducah, Ky.

E. T. BULLOCK,
Att'y for Appellant.

66 Be it remembered that at a Court of Appeals held at the Capitol at Frankfort on the 12th day of April, 1911, the following order was entered, to-wit:

ST. L., IRON MT. & SOUTHERN RY. CO.
vs.
McWHIRTER.

Hickman.

Came appellant by counsel and filed statement and motion to continue this case to the next term of this Court and for oral argument herein; the appellee objects to the continuance and the motions are submitted.

Afterwards at a Court of Appeals held as aforesaid on the thirteenth day of April, 1911, the following order was entered, to-wit:

ST. L., IRON MT. & SOUTHERN RY. CO.
vs.
McWHIRTER'S ADMR.

Hickman.

The court being advised appellant's motion to continue this case is overruled, but the motion for oral argument is sustained.

And afterwards at a Court of Appeals held as aforesaid on the Seventh day of June, 1911, the following order was entered.

ST. L., IRON MT. & SOUTHERN RY. CO.
vs.
McWHIRTER'S ADMR.

Hickman.

This case came on to be heard and was argued by W. V. Eaton for appellee and R. T. Railey and E. T. Bullock for appellant and submitted.

And afterwards at a Court of Appeals held at the Capitol at Frankfort and on the seventeenth day of November, 1911, the following judgment was entered, to-wit:

67 ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILROAD COMPANY, Appellant,
vs.
CORDIE McWHIRTER, Administratrix, Appellee.

Appeal from Hickman Circuit Court.

The court being sufficiently advised it seems to them that there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that appellee recover of appellant 10% damages on the amount of

the judgment superseded herein. Which is ordered to be certified to said court.

It is further considered that appellee recover of appellant her costs herein expended.

68 And on said above date, to-wit, November 17th, the Court delivered the following opinion:

69 Court of Appeals of Kentucky.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILROAD COMPANY, Appellant,

vs.

CORDIE MCWHIRTER, Administratrix, Appellee.

Appeal from Hickman Circuit Court.

Opinion of the Court by Judge Settle.

NOVEMBER 17, 1911.

This action was brought in the Hickman Circuit Court by appellee as administratrix of the estate of her deceased husband, Etwal McWhirter, to recover of appellant, its conductor and engineer, damages for his death, which occurred at Wolf Lake, Illinois, at which place one of appellant's trains ran over his body; he being at the time in appellant's employ as a flagman on the train.

70 It was, in substance, alleged in the petition, as amended, that in his capacity as flagman by direction of his superiors, appellee's intestate left Illmo, Missouri, on the train in question at 3:30 p. m., February 22nd, 1910, for a run to Bush, Illinois, and was killed at Wolf Lake, Illinois, on the return trip, at 7:37 o'clock a. m., February 23rd, 1910, by the negligence of appellant, its agents and servants, in compelling him to remain continuously on duty as flagman on the train for more than sixteen consecutive hours, and also by the negligence of the conductor and engineer of the train in operating it.

It was further alleged in the petition, as amended, that the train by which the appellee's intestate was killed, was at the time of his death engaged in interstate commerce, that is, in the business of transporting freight between Missouri and Illinois; that in requiring the intestate to serve as a flagman on its train for a longer period than sixteen consecutive hours, appellant violated the provisions of Section 2, Chapter 2939, United States Compiled Statutes, being part of an act of Congress entitled "An Act to Promote the Safety of Employés and Travelers Upon Railroads by Limiting the Hours of Service of Employés Thereon," which became a law March 4th, 1907; and also the provisions of another act of Congress entitled "An Act Relating to the Liability of Common Carriers by Railroads to their Employés in Certain Cases," which became a law April 22nd, 1908.

Appellant's answer, except with respect to appellee's ap-
71 pointment and qualification as administratrix and right to sue as such, traversed the averments of the petition as amended, and in addition, alleged that in entering its service as a flagman appellee's intestate by contract assumed the ordinary risks incident to that service; that his death was an unavoidable accident and resulted from an ordinary risk such as he contracted to assume, for which reason the law imposed upon appellant no liability for his death. These averments were controverted by reply, and on the trial the jury returned a verdict awarding appellee $3,000 damages. Appellant complains of the judgment entered upon the verdict and the refusal of the Circuit Court to grant it a new trial, hence this appeal.

Section 2, Chapter 2939, United States Compiled Statutes, upon which appellee's action was based, reads as follows:

"SECTION 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever such employé of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted to again go on duty until he has had at least ten consecutive hours off duty; and no such employé who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or
72 permitted to continue or again go on duty without having had at least eight consecutive hours off duty; Provided, that no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in cases of emergency, when the employés named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: Provided further, The Interstate Commerce Commission may, after full hearing in any particular case, and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case."

The evidence shows beyond doubt that the train on which the intestate was a flagman left Illmo, Missouri, at 3:30 p. m., February 22nd, 1910, for its regular run to Bush, Illinois, and return; and that in returning from the latter place to Illmo on the following day, February 23rd, 1910, the train ran over and killed the intestate at Wolf Lake Illinois, a town and station situated on appellant's railroad. There is some doubt under the evidence whether the intestate's death occurred at 7:35 or 7:37 a. m., February 23rd,
73 1910, but none whatever that it was as late as 7:35. Guess, appellant's engineer, at the time in charge of the train, testi-

fied at the Coroner's inquest, immediately following the accident, that the intestate's death occurred at 7:37 a. m., February 23rd, but later testified, in giving his deposition for use on the trial in the court below, that it occurred at 7:35 a. m., February 23rd.

Geo. C. Loper, a witness introduced on the trial by appellant, testified that the intestate was killed at 7:37 a. m., February 23rd, 1910, and no attempt was made by appellant to prove that he was killed earlier than 7:35 a. m. of that day, or that the intestate had not, when killed, been in service as flagman on the train for as much as sixteen hours and five minutes consecutively.

It is immaterial, therefore, whether his death occurred at 7:35 or 7:37 a. m., February 23rd, 1910, as it is patent from the evidence that it occurred after more than sixteen consecutive hours of continuous service by him as flagman on the one train operating between Illmo, Missouri, and Bush, Illinois.

In thus requiring of the intestate more than sixteen consecutive hours of service, albeit the excess of service over the sixteen hours was but five or seven minutes, appellant violated the statute, supra; and as the death of the intestate, from the act of its engineer complained of, occurred while he was engaged in the required continuous service and after the expiration of the sixteen consecutive hours allowed by the statute, there seems to be no escape
74 from the conclusion that the act of appellant in thus extending his service beyond the statutory limit was negligence per se, to which the intestate's death must, as a matter of law, be attributed, and, if so, the right of appellee to maintain this action cannot be questioned.

We also find from the averments of the petition as amended that appellee asserts the right to recover of appellant the damages claimed on the ground that the death of her intestate was also attributable to the negligence of the conductor and engineer in charge of the train. The record fails to show any negligence on the part of the conductor, other than his act in continuing the train crew on duty longer than sixteen consecutive hours, but there was some evidence tending to show negligence on the part of the engineer, from which the jury had the right to determine whether it was a concurring cause of the intestate's death.

It appears from the testimony of the engineer himself that the intestate's death occurred under the following circumstances: When the train reached Wolf Lake, the intestate, whose place as flagman was at the front end of the train, was notified by the engineer that it would stop over at that place on account of the sixteen-hour law. The intestate was then in the cab of the engine and he at once stepped out of the engine and along the foot board from which he got to the ground ahead of the engine, for the purpose of throwing a switch that the train might be side-tracked. Although in
75 view of the engineer all the time, the latter admitted he did not look to see where he was or what he did. Very soon after the intestate left the engine the engineer observed the Wolf Lake telegraph operator excitedly signaling him to stop the train, which

was then moving at the rate of three or four miles an hour. The engineer immediately stopped the train and, upon stepping off the engine, was told by the operator he had run over the intestate, whose body was found under the tank wheel, cut in two.

In reply to the direct question, "How was he killed?" the engineer said, "Performing his duty; going out to set a switch."

According to the testimony of the operator, Loper, who seemed to be the only eye-witness to the accident, the intestate left the engine as described by the engineer and ran toward the switch but fell between the rails before reaching it. He then got upon his hands and knees, but before getting to his feet was run over by the engine. When he fell the operator began signaling the engineer to stop the train, but the latter failed to observe the signals in time to stop the engine before it ran over the intestate.

There was no proof that the manner in which the intestate approached the switch was not the usual and an ordinarily safe way of doing so and of setting the switch; and as he was in plain view of the engineer from the time he left the engine, or would have been if the engineer had maintained a lookout in that direction, the latter, knowing he was going in front of the engine, should have
76 kept such lookout for his movements; had he done so there was nothing to prevent his seeing him fall, and with the train going at only three or four miles an hour the reversal of the engine and application of the air brakes might, and in all probability would, have stopped the train in time to enable the intestate to regain his feet and make his escape.

If appellee's right of recovery had depended alone upon her ability to show that her intestate's death was caused by the negligence of the engineer, there was, as we have seen, evidence conducing to prove such negligence.

It is, however, proper to say that the negligence of appellant's engineer in the particular mentioned, and that of its conductor, or some other servant in control of its transportation department, in keeping appellee's intestate on duty as a brakeman for a longer period than sixteen consecutive hours, concurred in causing his death, and all being servants of appellant their negligence is chargeable to it. Therefore, the question of proximate cause raised by counsel for appellant can have no part in our consideration of the case.

Recurring to the appellant's violation of the provisions of the statute prohibiting it from requiring its employés to remain on duty longer than sixteen consecutive hours, we find that the language of the provision in question is mandatory and that the duty it imposes is a definite, absolute duty. Its non-performance may not, therefore, be excused by a showing on the part of the railroad company that it used ordinary care or reasonable diligence to perform it,
77 but was unable to do so. The violation of such a statutory duty is, therefore, negligence per se. Our meaning cannot be better expressed than in the language of the following excerpt from the opinion of the Georgia Supreme Court in the case of Platt v. Southern Photo Material Co., 60 S. E., 1066:

"Every violation of any of those duties of omission or commission, which, arising from man's estate as a social being, has received recognition by the law of the land, either generally or specifically, is an act of negligence. So long as these duties remain undefined, or defined only in abstract, general terms, a breach is not properly denominated negligence per se; but when any specific act or dereliction is so universally wrongful as to attract the attention of the lawmaking power, and this concrete wrong is expressly prohibited by law or ordinance, a violation of this law, a commission of the specific fact forbidden is for civil purposes correctly called negligence per se. In those jurisdictions in which the application of the facts to the law rest with the jury, the Court can not primarily declare that any particular concrete act, or state of circumstances amounts to a breach of duty unless the law so expressly declares. This finding is left to the jury; but if the law itself puts its finger on a particular thing and says, 'This is wrong', the Court may also (for there is no question to a fact which the law says exists) put its finger on that same thing and say, 'This is negligence—
78 negligence per se.' This artificial distinction between negligence per se and negligence not per se, respects, therefore, merely the method by which the existence of negligence is to be ascertained in particular instances. When once its existence is determined, whether through the Court's judicial cognizance, or the jury's findings, as a matter of fact, there is no further distinction made, and the one form of negligence has in the further consideration of the case just the same effect as the other—no more, nor less."

We have repeatedly recognized the rule here announced. Thus in National Casket Co. v. Power, 137 Ky., 156, which was an action to recover damages against the owner of an automobile by one whose horse was frightened and himself injured by the alleged negligence of the person in charge of the machine in failing to slacken its speed and give the signals of its approach as required by Section 2939*g*, Kentucky Statutes, we, in commenting on the effect of a failure to obey the statutory standards of care, in the opinion, said:

"The evidence for the plaintiff was that Moore did not sound any warning whatever; that he was driving the machine at a very high rate of speed, and that he did nothing toward respecting the safety of the ladies except swerve to the right so as to well miss their vehicle. These facts presented prima facie a case of negligence. The failure to sound the horn, or other similar contrivance to signal the approach of the car, was a violation of the statute, was per
79 se negligence, and if the injury to the plaintiffs was occasioned thereby, being a proximate result of such failure, appeallants are liable to respond in damages. Nashville, Chattanooga & St. Louis R. R. Co. v. Higgins, 29 R., 89, 92 S. W., 549; Cumberland Tel. Co. v. Yeiser, 141 Ky., 15."

In addition to the above authorities in this jurisdiction we cite the following cases of like import, decided by the courts of last resort of other States: Vandeveer v. Moran (Neb.), 112 N. W., 581; L. & N. R. R. Co. v. Haynes (Ind.), 91 N. E. 962.

Our attention has not been called to any case in which the precise

question upon which it it here sought to hold appellant responsible for the death of appellee's intestate has been passed on, but we find that the constitutionality of the Act of March 4th, 1907 (Chap. 2939, U. S. Comp. Stats.), was sustained by the Supreme Court in Balto. & Ohio R. R. Co. v. Interstate Commerce Commission, U. S. Supreme Court Advance Sheets, 621. The case arose on a bill in equity to annul an order made by the Interstate Commerce Commission, which required the carriers within the provisions of the act in question to make monthly reports, under oath, showing the instances where employés subject to the act had been on duty for a longer period than sixteen consecutive hours. In the opinion it is said:

"Although the question was not specifically raised by the bill it is now contended that the statute is unconstitutional in its en-
80 tirety, and, therefore, no action of the commission can be based upon it. It is said that it goes beyond the power which Congress may exercise in the regulation of interstate commerce; that while addressed to common carriers engaged in interstate transportation by railroad to any extent whatever, its prohibitions and penalties are not limited to interstate commerce, but apply to intrastate railroads and to employés engaged in business. The prohibitions of the act are found in section 2. This provides that it shall be 'unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employé, subject to this act, to be or remain on duty' for a longer period than that prescribed. * * * But the argument undoubtedly involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employés in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employés who have to do with the movement of trains in interstate transportation are, by virtue of practically necessity, also employed in intrastate transportation. This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign com-
81 merce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce, and of those who are employed in transporting them. * * * The fundamental question here is whether a restriction under the hours of labor of employés who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of its employés and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it

was also competent to consider and to endeavor to reduce the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons placed within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution. Chicago, B. & Q. R. R. Co. v. McGuire, 219 U. S. 549, ante 259, 31 Sup. Ct. Rep. 259. If, then, it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours
82 of labor of employés engaged in interstate transportation, it follows that the power cannot be defeated by prolonging the period of service through other requirements of the carriers, or by the commanding of duties relating to interstate and intrastate operations." It appears that other objections were made to the validity of the satute; that it was void for uncertainty; that the interstate Commerce Commission was without authority to require the reports called for by its orders; and that to compel the disclosures by these reports of violations of the law would be contrary to the Fourth and Fifth Amendments to the Constitution of the United States, having reference to unreasonable search and seizure and privilege against self-crimination. These objections were all elaborately considered in the opinion and disposed of adversely to the contentions of the railroad company. The case, supra, effectually disposes of the objections raised in this case by counsel for appellant to the constitutionality of the act in question and renders further consideration thereof by us unnecessary.

While, as previously stated, we have been referred to no case determining the carrier's liability for the death of a train employé while engaged in its service, in violation of the restriction contained in the act limiting such service to sixteen consecutive hours, we find numerous cases which, in construing that part of the act, and a previous act, relating to the equipment of cars engaged in interstate commerce with safety appliances, hold that it abolishes the
83 fellow servant doctrine and also the doctrine of assumption of risk; furthermore, that if a railroad in the operation of its cars violates a duty enjoined by the provisions of the act, which results in injury to an employé, such violation imposes upon it the duty to make compensation to the person injured. United States v. Atchison, T. & S. F. R. Co., 163 Fed. Rep., 517; Watson v. St. Louis, Iron Mountain & Southern R. R. Co., 169 Fed. Rep., 942; Southern R. R. Co. v. Carson, 194 U. S. 136; U. S. v. Atlantic Coast Line R. R. Co., 153 Rep. 918; U. S. v. Southern R. R. Co., 135 Fed. Rep. 122; U. S. v. Great Northern R. R. Co., 150 Fed. Rep., 229. In other words, as held in St. Louis, Iron Mountain & Southern R. R. Co. v. Taylor, 210 U. S., 281:

"The obvious purpose of the Legislature (i. e., Congress) was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does in point of fact, use cars which do not comply with the standard, it violates the

plain provisions of the law, and there arises on that violation the liability to make compensation to one who is injured by it."

In Chicago, B. & Q. Ry. Co. v. U. S., July, 1911, Supreme Court Advance Sheets, 612, it was held that a carrier using, in moving interstate traffic, cars whose condition do not satisfy the requirements of the safety appliance act, cannot escape the penalty therein prescribed by showing that it exercised reasonable care in
84 equipping its cars with the required safety appliances, and used due diligence to keep them in repair by the usual inspection, as the statutes impose an absolute duty upon the carrier which is not discharged by the exercise of reasonable care or diligence.

In the opinion delivered by Mr. Justice Harlan, the reasoning and conclusions of the Court in the leading case of St. Louis, I. M. & S. R. R. Co. v. Taylor, 210 U. S., 281, were adopted, following which it is said:

"It cannot then be doubted that this court in the Taylor case considered the scope and effect of the safety appliance act of Congress as directly involved in the questions raised in that case, and it expressly decided that the provision in the second section relating to automatic couplers imposed an absolute duty on each corporation in every case to provide the required couplers on cars used in interstate traffic. It also decided that non-performance of that duty could not be evaded or excused by proof that the corporation had used ordinary care in the selection of proper couplers, or reasonable diligence in using them and ascertaining their condition from time to time. That the Taylor case as decided by this court has been so interpreted and acted upon by the Federal courts generally is entirely clear, as appears from the cases cited in the margin. * * * The Taylor case was a strictly civil proceeding, being an action by an individual to recover damages for a personal injury al-
85 leged to have been caused by the negligence of the corporation; whereas, the present action is to recover a penalty. This difference, it is suggested, will justify a re-examination, upon principle, of the rule announced in the Taylor case. In effect the contention is that the present action for a penalty is a criminal prosecution, and that the defendant cannot be held guilty of a crime when it had no thought or purpose to commit a crime and endeavored with due diligence to obey the act of Congress. This contention is unsound because the present action is a civil one. It is settled law that 'a certain sum, or sums which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by a civil action, even if it may also be recovered in a proceeding which is technically criminal.' Hepner v. U. S. 213, U. S. 103. * * * The power of the Legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned."

As further illustrating the harmony of opinion manifested by the Federal courts with respect to this question, consideration of the very recent case of Delk v. St. Louis & S. R. R. Co., July, 1911, Advance Sheets, U. S. Supreme Court Reports, 617, will be found instructive.

Delk sued the St. Louis and San Francisco R. R. Co., a Missouri corporation, engaged in commerce as a carrier of freight and
86 passengers, through Missouri, Tennessee and other States, for damages resulting from injuries he sustained while engaged in the discharge of his duties as a brakeman of the railroad company. On the petition of the railroad company the case was removed to the Circuit Court of the United States on the ground of diversity of citizenship. The basis of the plaintiff's claim, as set forth in the declaration, was the alleged failure of the railroad company to provide proper automatic couplers as required by the safety appliance act. The answer of the railroad company traversed the averments of the declaration and pleaded contributory negligence on the part of the plaintiff.

It appeared from the facts presented by the record that the car with the defective coupler which caused the injury was loaded with lumber and had been received by the railroad company to be carried to Memphis, Tennessee; the latter delivered it to the Union Railway Company for transportation to its destination. After receiving the car and before moving it, the Union Railway Company discovered that it was provided with a defective coupler and immediately returned it to the defendant railroad, which placed it on a side track in its yard, where it was examined by its inspector, who put upon it a placard containing the words "out of order." On the following day Delk was injured in an effort to couple the defective car to another for its removal from the side track. Owing to its defective coupling, he could not couple the cars without going between them, which he did, and in attempting with his foot to hold the draw bar of the defective car until the coupling of the
87 car could be effected by the impact, his foot was caught between them and crushed.

On the trial the Circuit Court seemed to have instructed the jury, in substance, that as a matter of law, the statute imposed upon the railroad company the absolute duty to keep its cars provided with the character of coupling appliances described in the statute, and that in failing to so provide the car by which Delk was injured and in attempting to move the car in its defective condition, it was guilty of negligence which entitled him to recover, unless he was himself guilty of negligence, which so contributed to his injury, that but for such negligence he would not have been injured. So, the only issue submitted to the jury was as to the question of contributory negligence.

The trial in the Circuit Court resulted in a verdict and judgment in favor of Delk for $7,500, which that court compelled him, by remittitur, to reduce to $5,111. The Circuit Court of Appeals reversed the judgment and remanded the case for a new trial, following which the Supreme Court allowed a writ of certiorari, and upon a review of the errors assigned, that court reversed the judgment of the Circuit Court of Appeals, and affirmed the judgment of the Circuit Court.

In an able opinion delivered by Mr. Justice Harlan, the following conclusion was expressed:

"As the case is here upon certiorari to review the judgment of the Circuit Court of Appeals, this court has the entire record before it, with the power to review the action of that court, as well as
88 direct such disposition of the case as that court might have done when hearing the writ of error sued out for review in ths action of the Circuit Court. Lutcher & M. Lumber Co. vs. Knight, 217 U. S., 257. In this view the judgment of the Circuit Court of Appeals must be reversed, because, for the reasons above stated, it erred in not holding that the statute under which the case arose imposed on the carrier an absolute duty to provide its cars, when moving interstate traffic, with the required couplers and keep them in proper condition, and that too, without any reference to the care of diligence which might have been exercised in performing its statutory duty. But on looking further into the record from the Circuit Court, we find that no error of law was committed by that court; for it proceeded on the construction of the statute which this court has approved in Chicago, B. & Q. R. R. Co. v. United States, just decided. Nor did the Circuit Court commit any error in respect to any issue of contributory negligence. It properly submitted that question to the jury. Therefore, the reversal of the judgment of the Circuit Court of Appeals, on the ground we have above stated, constitutes no reason why the judgment of the trial court should be disturbed."

It should be stated in this connection that at the time of the trial of the Delk case, and until the original safety appliance act of 1893 was amended by that of April 22nd, 1908, contributory negli-
89 gence on the part of a person injured by a defective car, could be relied upon by a railroad company, as a ground of defense in an action under the safety appliance statute for such injury; but the amendment in question, which was in force when the appellee's intestate in the instant case was injured, excludes such a defense. Schlemmer v. Buffalo R. & P. Co., July, 1911, Advance Sheets U. S. Supreme Court Reports, 561. As the defense of assumption of risk was abrogated by the original act, neither of these doctrines has any place in this case.

In view of the foregoing authorities, State and Federal, we conclude that the facts alleged by appellee in her petition, and fairly sustained by the evidence appearing in the record, fasten upon appellant responsibility for her intestate's death. If the grounds of defense interposed by the appellant's answer would be unavailing, had the intestate's death been caused by a defective appliance on one of its cars, they must upon principle, be held equally so, where the death was caused by its wrongful act in requiring him to continue in the performance of his duties as a brakeman in its service, beyond sixteen consecutive hours, even though the negligence involved in the act was only a concurring cause, operating with the negligence of its engineer, in bringing about the death."

The requirements of the statute with respect to the safety appliances to be used on appellant's trains, are no more imperative or mandatory than is the statutory restriction here involved upon its right to suffer its employés to engage in its service more than
90 sixteen consecutive hours. The violation of the statute in either case invites the penalty prescribed, and the offender

will not be excused upon a showing of reasonable effort or diligence in attempting to comply with the statutory requirements.

Appellant did not attempt to bring itself within the provisions of section 3 of the Act of March, 1907, for its answer contains no plea that its violation of the statute was occasioned by casualty, unavoidable accident, the act of God, or any other cause allowed by that section as an excuse.

In our view of the case there was no error in the trial court's refusal to give the peremptory instruction asked by appellant, and it is not perceived that any just reason is presented for its objections to the instructions that were given to the jury.

Instruction No. 1 authorized a verdict for appellee if the train by which her intestate was killed was, at the time, engaged in interstate commerce, and his death was caused by the negligence of the engineer in operating the train. We are unable to see any error in this instruction. It is conceded the train was engaged in interstate commerce, but whether so or not, if the intestate's death resulted from the negligence of the engineer alone, appellant would, as master, be responsible therefor, independently of its negligence in violating the sixteen-hour law.

Instruction 2 merely defines the meaning of the words "interstate commerce," and is unobjectionable in form.

Instruction 3 properly defines negligence as used in the in-
91 structions; and by instruction 4 the jury, in substance, were told that if they believed from the evidence appellee's intestate had been permitted or required by appellant to remain on duty as a brakeman continuously for more than sixteen consecutive hours, immediately before his death, appellant was negligent by reason thereof, and liable in damages for the intestate's death, if they further believe from the evidence such negligence contributed to his death; and if they so believed, they should find for appellee such damages as resulted from appellant's negligence in thus causing her intestate's death, not to exceed $25,000, the amount claimed in the petition.

This instruction correctly stated the law on the feature of the case intended to be covered by it, and as our reasons for this conclusion have already been fully stated, further elaboration of this is unnecessary.

Instruction 5 is but the converse of instruction 4, and while unnecessary, was not improper.

Instructions 1, 2, 4 and 5 might have been more aptly expressed, but being substantially correct, mere inaptness of statement furnishes no ground for condemning them.

Appellant complains, however, that there was no instruction given the jury on the measure of damages. This is true, and such an instruction should have been given, but the failure of the Court to give it is not ground for a reversal because appellant did not
ask such an instruction, although others were requested by it
92 with reference to other features of the case.

In Louisville & Nashville Railroad Co. v. Roberts, 24 R. 1160, we said:

"It has been so frequently held that it is deemed unnecessary to again elaborate the idea that, in a civil case, unless the objecting party offers an instruction covering the point of his objection, he will not be heard, upon appeal, of the inadequate instruction given. Swandale Lumber Co. v. Thomas, 129 Ky. 799; Patterson v. T. J. Moss Tie Co., 97 S. W., 399; L. & N. R. R. Co. v. Harrod, 115 Ky., 877."

We have also held that where an improper instruction as to the measure of damages has been given, the error would be cured by the verdict of the jury, if such verdict be as small as it would have been had the proper instruction been given. Ky. Distillery & Warehouse Co. v. Barret, 112 S. W., 643; Katterjohn v. Nahm, et al., 106 S. W., 1179, 32 Ky. L. R., 727.

As appellee's intestate was a young man about thirty years of age with an expectancy, at least, of 27 years, it is apparent that the destruction of his power to earn money damaged his estate, even more than the three thousand dollars awarded by the verdict of the jury; it is patent, therefore, that the appellant's rights were not prejudiced by the failure of the Court to give an instruction on the measure of damages.

93 Appellant also complains of the refusal of the Circuit Court to remove the case to the United States Circuit Court for the District of Kentucky. It appears that the Courts of the several states are, by the provision of the statute, supra, and the amendment of April 22nd, 1908, given jurisdiction concurrent with that of the Courts of the United States, in cases arising under the statute. It is true, appellant's petition rested its right to be removed on the ground of diversity of citizenship, but as it took no exception to the action of the Court in refusing the removal, its complaint of the removal will not now be entertained.

In conclusion, we are moved to say that the salutary object designed by the enactment of the statute, supra, would, in our opinion, be defeated if we should hold its provisions inapplicable to a case like the one at bar. Its aim is the protection of the lives of employés of railroad companies, and also the lives and property entrusted to the railroads as common carriers. It recognizes that there is a limit to human endurance and that hours of rest and recreation, as well as the use of good machinery and appliances, are needful to the health and safety of men engaged in the hazardous work of railroading and that the benefit it is intended to confer will better enable them to serve their employers and promote the ends of commerce. The application of the provisions of the statute may sometimes bear harshly upon an offending railroad company, but, on the whole, their just enforcement, in all proper cases, is bound to be promotive of the public welfare.

94 The errors assigned not justifying a reversal, the judgment is affirmed.

E. T. Bullock, R. T. Railey, for appellant.
Eaton & Boyd, for appellee.

95 Afterwards at a Court of Appeals held as aforesaid on the fifteenth day of December, 1911, the following order was entered, to-wit:

ST. L., IRON MT. & SOUTHERN RY. CO.
vs.
MCWHIRTER, Adm'x.

Hickman.

Came appellant by counsel and filed petition and moved the court for a rehearing herein and for oral argument on same, and the court being advised the motion for oral argument is overruled and the motion for a rehearing is submitted.

96 The petition filed by the foregoing order is in words and figures, as follows, to-wit:

In the Court of Appeals of Kentucky.

MRS. CORDIE MCWHIRTER, Administratrix of the Estate of Etwal McWhirter, Deceased (Plaintiff), Appellee.
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY (Defendant), Appellant.

Appellant's Motion for Rehearing, with Brief and Argument in Support of Same.

Now comes said Appellant, by its attorneys, and moves the Court to set aside the order and judgment of affirmance entered herein on November 17, 1911, and to grant it a rehearing for the following reasons:

I. Because the Court erred in holding that plaintiff's petition, including the amendment, contained facts sufficient to authorize a recovery in favor of plaintiff based upon the alleged negligence of the conductor and engineer at the time and place of accident. (In support of this proposition, see pages 30 to 39, inclusive, of printed brief herewith filed.)

II. Because, in considering the case, the Court, as shown by its opinion, overlooked and misconstrued the evidence disclosed
97 by the record in respect to the alleged negligence of the engineer at the time and place of accident. (See pages 39 to 50, inc., of printed brief herewith filed.)

III. Because the Court erred in holding that plaintiff's instruction marked "C" (p. 34 of Record) properly declared the law. (See page 50 of printed brief herewith filed.)

IV Because the Court erred to the prejudice of Appellant in its construction of the Federal Employers' Liability Act of 1908 (35 U. S. Stat. at Large, 65, Chap. 149), as applicable to the facts and

pleadings disclosed by the record in this cause. (See pages 51 to 56, inc., of printed brief herewith filed.)

V. Because the Court misconstrued the Employers' Liability Act of 1908, and erred in holding that Appellant was an insurer as against the act of the engineer in running over deceased at the time and place of accident. (See pages 56 to 59, inc., of brief herewith filed.)

VI. Because the Court erred in holding that there was any legal evidence shown at the trial with reference to the conduct of the engineer at the time and place of accident, which operated as a proximate cause of the death of plaintiff's husband. (See pages 59 to 64, inc., of printed brief herewith filed.)

VII. Because the Court, in the opinion of counsel for Appellant, in the consideration of this case has misconstrued and erroneously applied the principles of law involved in the Hours of Service Act (34 U. S. Stat. at Large, 1415, 1416, Chap. 2939) to the case at bar. (See pages 64 to 68, inc., of printed brief herewith filed.)

98 VII. Because the Court, in our opinion, misconstrued the Hours of Service Act, supra, as applicable to the facts in this case. (See pages 68 to 74, inc., of printed brief herewith filed.)

IX. Because, in the opinion of Appellant's counsel, the Court misconstrued the Hours of Service Act in holding that a right of action could be maintained thereunder, on account of the provisions of the Employers' Liability Act, supra, which authorize a recovery for damages where any statute enacted for the protection of an employé has been violated. (See pages 74 and following of printed brief herewith filed.)

(We have filed herewith a printed brief setting out the original propositions, with printed argument in support of each proposition.)

Respectfully submitted,

E. T. BULLOCK AND
R. T. RAILEY,
Attorneys for Appellant.

Filed Dec. 14, 1911.
NAPIER ADAMS, *C. C. A.*

99 The printed petition filed with the foregoing motion is in words and figures, as follows, to-wit:

100 *Employers' Liability Act of* 1908.

"An Act Relating to the Liability of Common Carriers by Railroad to Their Employés in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall

be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then
101 of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé: Provided, That no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.

SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employés, such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.

SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought
102 against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance,

relief benefit, or indemnity that may have been paid to the injured employé or the person entitled thereto on account of the injury or death for which said action was brought.

SEC. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

SEC. 7. That the term 'common carrier' as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employés under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the acts of Congress entitled 'an act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employés', approved June eleventh, nineteen hundred and six.

Approved, April 22, 1908."

(35 U. S. Stat. at L. 65 C. 149.)

Employers' Liability Act, Amendment of 1910.

"An Act to Amend an Act Entitled 'An Act Relating to the Liability of Common Carriers by Railroad to Their Employés in Certain Cases', Approved April Twenty-second, Nineteen Hundred and Eight.

103 Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled 'An act relating to the liability of common carriers by railroad to their employés in certain cases', approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

'SEC. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

'Under this act an action may be brought in a Circuit Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States.'

SEC. 2. That said act be further amended by adding the following section as section nine of said act:

'SECTION 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representa-

tive, for the benefit of the surviving widow or husband and children of such employé, and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, but in such cases there shall be only one recovery for the same injury.'

Approved, April 5, 1910."

Hours of Service Act.

"Be it enacted by the Senate and House of Representa-
104 tives of the United States of America in Congress assembled,

That the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employés, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one state or territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad', as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'employés', as used in this act, shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employé of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employé who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, That no operator,

train despatcher, or other employé who, by the use of the
105 telegraph or telephone, despatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employés named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: Provided further, The Interstate Commerce Commission may, after full hearing in a particular case, and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employé to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such District Attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper District Attorneys information of any such violations as may come to its knowledge. In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all
108 acts of all its officers and agents: Provided, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officers or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen: Provided further, That the provisions of this act shall not apply to the crews of wrecking or relief trains.

SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act.

SEC. 5. That this act shall take effect and be in force one year after its passage."

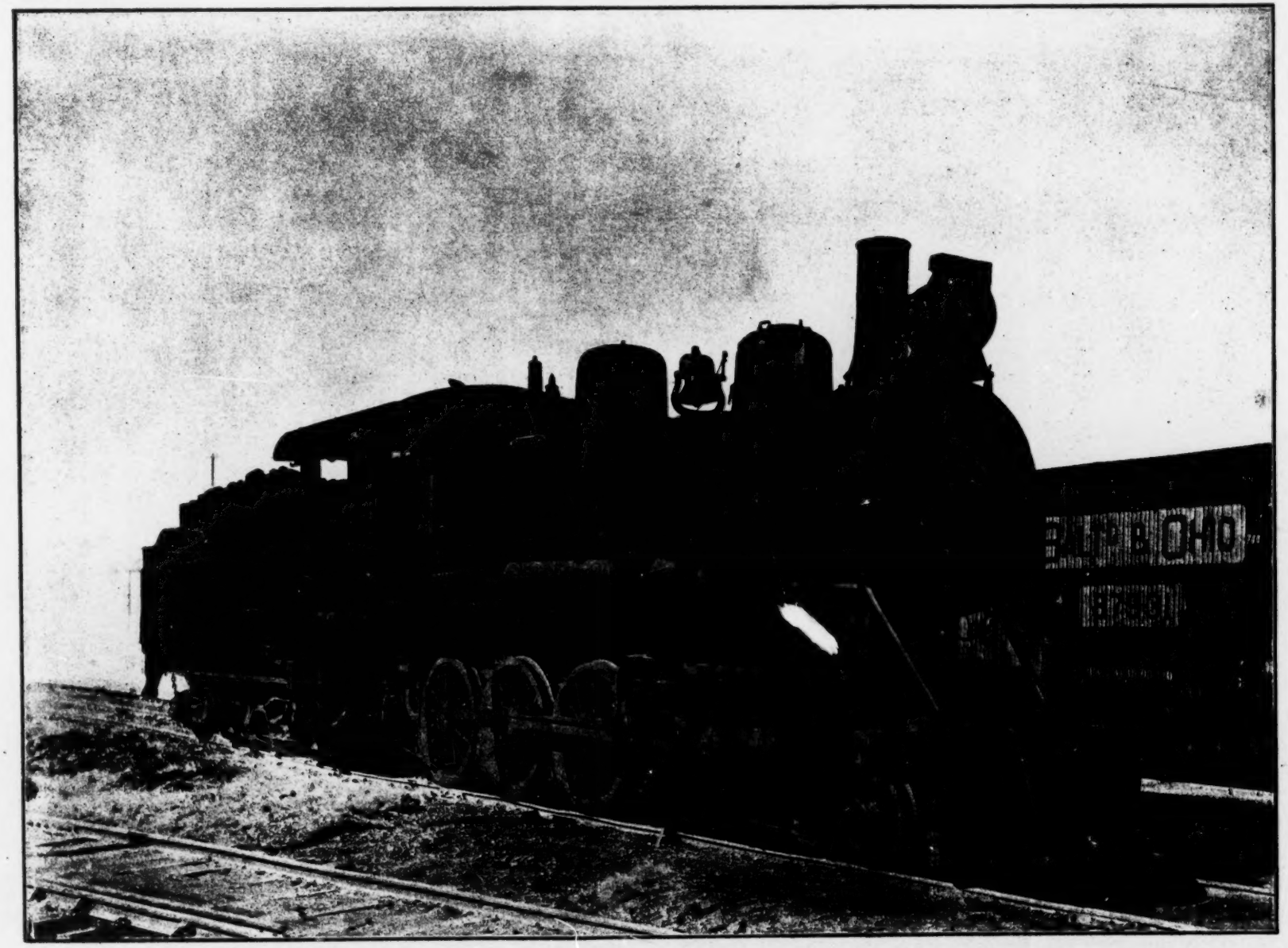
(34 U. S. Stat. at L. 1415, 1416, C 2939.)

(Here follows diagram marked pp. 106 & 107.)

No 910
Ry. Co.
Wm Winter
p 106

ENGINE NO. 503.

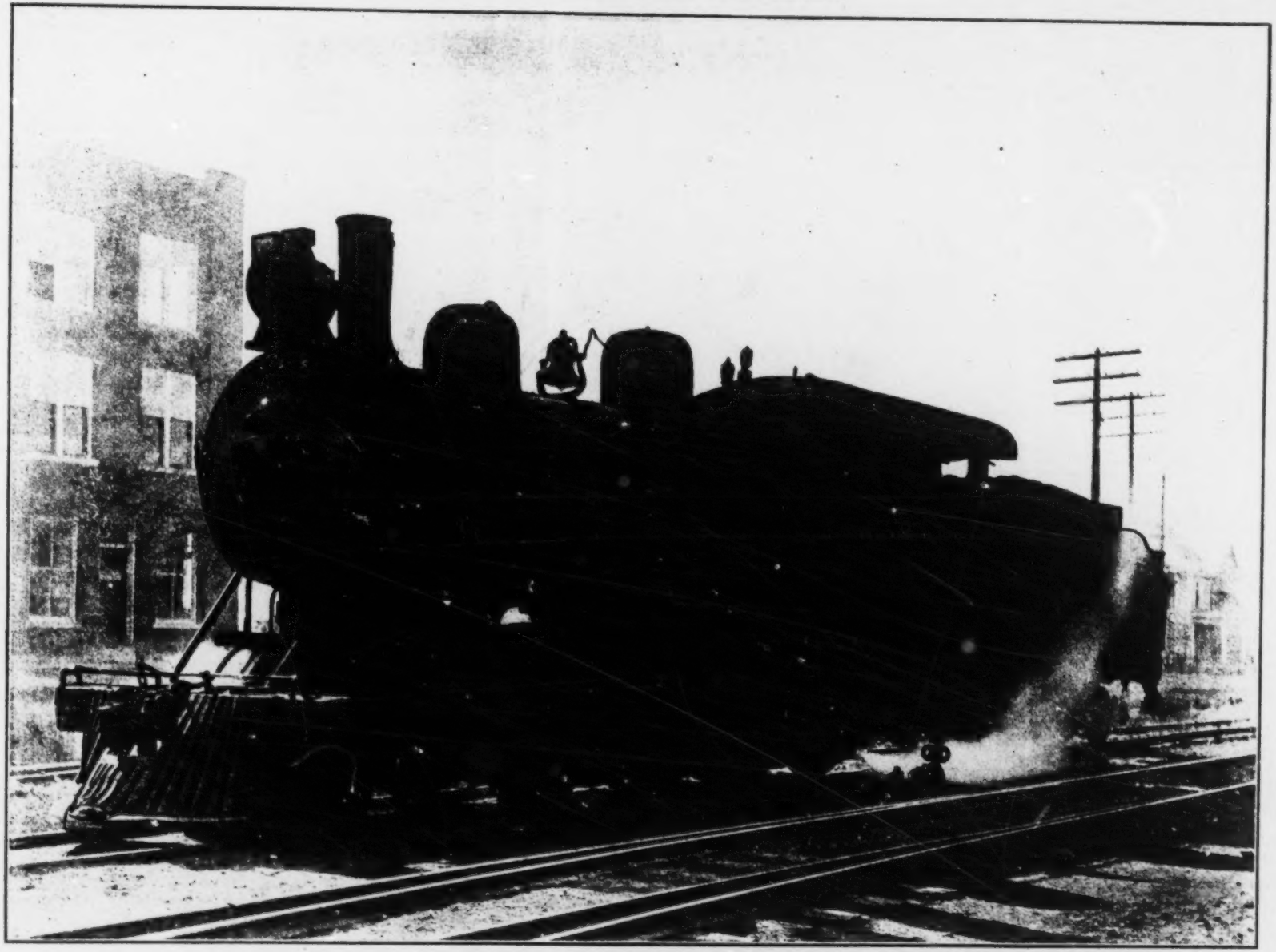
View from Engineer's Side of Locomotive.



No 970 -
Ry. Co
v.
[illegible]
p. 107

ENGINE NO. 503.

View from Fireman's Side of Locomotive.



109 *Motion for Rehearing and Appellant's Brief in Support of Same.*

Now comes said appellant, by its attorneys, and moves the Court to set aside the order and judgment of affirmance entered herein on November 17, 1911, and to grant it a rehearing for the following reasons:

I.

Because the Court erred in holding that plaintiff's petition, including the amendment, contained facts sufficient to authorize a recovery in favor of plaintiff based upon the alleged negligence of the conductor and engineer at the time and place of accident. The petition fails to state any issuable fact, and abounds solely in legal conclusions in respect to the foregoing matters.

The petition (R., pp. 3 and 4) attempts to plead two separate grounds of negligence: First, it is charged that

"the death of said Etwal McWhirter resulted from the wrongful acts of the conductor and engineer in charge of the train and locomotive on which the said Etwal McWhirter, deceased, was at the time of his death employed and acting as flagman, as aforesaid, * * *

Plaintiff further says that her cause of action herein arose against the defendant by reason of the wrongful and negligent death of her aforesaid husband, Etwal McWhirter, which was occasioned by the negligent and wrongful acts of the officers and agents of the defendant, as aforesaid, in managing and operating its train, while her husband was employed by the defendant, St. Louis, Iron Mountain & Southern Railway Company, as flagman on a train and locomotive engaged in interstate commerce as aforesaid."

And second:

110 "That the aforesaid negligent and wrongful acts of the officers and agents of said defendant, and the said violation of the laws of the United States relating to interstate commerce, were the approximate and sole causes of the death of her said husband, and she relies on the laws of the United States made and provided in such cases. * * * That by reason of the wrongful and negligent acts of the defendant, and its officers and agents, and the aforesaid violations of law as set out above, which acts and violations of law resulted in the death of the said Etwal McWhirter, she has been damaged, etc."

In other words, these allegations, when reduced to a final analysis, are equivalent to charging that the conductor and engineer of defendant's train, while engaged in interstate commerce at Wolf Lake, Illinois, on February 23, 1910, wrongfully and negligently ran the locomotive of the train upon which the deceased was flagman and killed the latter while in the alleged performance of his duty. What was the engineer doing at the time? Did he fail to give deceased any signals of his approach? Was he running too fast? Was he looking in some other direction than down the track upon which his

locomotive was moving? Was he aware of the fact that the deceased was on the track in front of said locomotive? Did he know deceased was on the track? Could he see deceased after the latter left the engine cab up to the time he was killed? Was deceased properly performing his duty in getting off the pilot of the engine and running so closely in front of a moving train as to get run over before he had time to arise to his feet after falling? The petition contains none of the facts aforesaid, but simply pleads, by way of legal con-

111 clusion, that the engineer wrongfully and negligently ran over and killed deceased at the time and place above mentioned. In our opinion, it states no cause of action whatever in respect to the foregoing question under the Employers' Liability Act of 1908, or under any other statute or law.

Willard v. Zehr, 215 Ill. 148; s. c. 74 N. E. 107;
Schueler et al. v. Mueller, 61 N. E. 1044 (Ills.);
Southern Ry. Co. v. King, 217 U. S. 536-7, l. c.;
Sargent v. Baublis, 215 Ills. 428; s. c. 74 N. E. 455;
Paganes v. City of Chicago, 111 Ill. App. 590;
Pier et al. v. Heinrichoffen et al., 52 Mo., l. c. 335-6;
Sidway v. M. L. & L. S. Co., 163 Mo. 372-5.
Mallinckrodt Chem. Wks. v. Nemnich, 169 Mo. 395 et seq.;
Gibson v. Railway Co., 225 Mo. 481-483, inc.;
Louisville Canal Co. v. Murphy, 9 Bush. 522 (Ky.);
Stivers v. Baker et al., 87 Ky. 508; s. c. 9 S. W. 491-2;
Clark v. Dillon, 97 N. Y. 370;
Sec. 4 Carroll's Kentucky Code (1906 Rev.), p. 18.

Sec. 4 of Carroll's Kentucky Code (1906 Rev.), p. 18, reads as follows:

"Forms of Action. There shall be but one form of action."

On page 18 of the Code aforesaid will be found the following:

112 "Forms, not substance abolished by Code; and the pleader must state in ordinary and concise language the facts constituting the cause of action. Every fact necessary to enable the plaintiff to recover must be alleged, and every essential allegation required to make a declaration good at common law upon demurrer must be made. The facts must be alleged so as to enable the opposite party to know what is meant to be proved, and also that an issue may be formed in regard to the subject-matter in dispute and to enable the court to pronounce the law upon the facts stated. Louisville Canal Company v. Murphy, 9 Bush. (Ky.) 522; Stivers v. Baker, 87 Ky. 508 (9 S. W. 491-2), 10 R. 523; Murphy v. Estes, 6 Bush. 532; Huffaker v. Nat. Bk., 12 Bush. 287."

In Louisville & Portland Canal Co. v. Murphy, Admr., Etc., 9 Bush 527, l. c., Judge Pryor, speaking for this court, said:

"The Code of Practice requires the pleader to state in ordinary and concise language the facts constituting the cause of action; and while the ancient forms of pleading are abolished, by its provision, still every fact necessary to enable the plaintiff in the action to recover must be alleged, and every essential averment required to make a

declaration good at common law upon general demurrer must be made in the petition under our present system of pleading. The facts must be alleged, so as to enable the opposite party to know what is meant to be proved, and also that an issue may be formed in regard to the subject-matter of dispute, and to enable the court to pronounce the law upon the facts stated. (1 Chitty's Pleadings, 213)."

113 The quotations above made are very clear and explicit as to what the petition shall contain. Tested by said quotations, the declaration in the case at bar utterly fails to comply with the requirements of the Code in any respect. When divested of all unnecessary language, the petition under consideration simply states that the engineer in charge of the train ran over and killed plaintiff's intestate at the time and place of accident. Not a single issuable fact is presented either in the original or the amended petition.

Section 1727 of the Revised Statutes of Missouri, 1909, under the title of "Forms of Action and Parties Thereto" provides that:

"There shall be in this State but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a civil action."

Section 1794, Revised Statutes of Missouri, 1909, provides that the petition shall contain:

"First, the title of the cause. * * * Second, a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition."

In Pier v. Heinrichoffen, 52 Mo. 335-6 l. c., it is said:

"As the vice of the old system of pleadings was its prolixity, its general averments, and general issues, and the delay and expense inseparable from it, the new system (or the modifications of the old) which we have adopted has little claim to be considered a re-

114 form, unless it avoids such defects and furnishes rules, by which the great object of all pleadings is better attained, namely, to arrive at a material, certain and single issue. Hence, the great improvement of our Code consists in requiring the pleadings to contain a plain and concise statement of the facts, constituting a cause of action, or matter of defense. (2 W. S. 1013, Sec. 3; and 1015, Sec. 3.) Facts, and not evidence, nor conclusions of law, must be distinctly stated. Every fact, which the plaintiff must prove to maintain his suit, is constitutive in the sense of the Code, and must be alleged."

The foregoing quotation is in full accord with that made from the Kentucky decision, supra, and is sustained by all of the other authorities cited.

In Gibson v. Railway Company, 225 Mo. 482-3, l. c., the Supreme Court of Missouri, in discussing the question under consideration, said:

"Plaintiff states that under and by virtue of sections 3313 and 3443 of the Code of Iowa actions for damages for the death of Martin M. Welch, survived to plaintiff as administrator, and under and by virtue of said sections, plaintiff is authorized and empowered to sue and recover damages caused by the death of Martin M. Welch

against defendant on account of the carelessness and negligence of defendant, which resulted in the death of Martin M. Welch, as hereinafter alleged.

"These allegations are in no sense statements of facts, but are clearly conclusions of law drawn by the pleader; and, in passing upon the demurrer, they should be eliminated from the petition, for the reason that they are neither traversable nor demurrable.

115 "In passing upon a simiar question, this court, in the case of Mallinckrodt v. Nemnich, 169 Mo., l. c. 397, used this language: 'The allegation quoted is simply the averment of a legal conclusion; not the statement of issuable facts; not, therefore, either traversable or demurrable, and is to be treated as no statement at all, and consequently obnoxious to attack by general demurrer. (Bliss Code Plead. (3 Ed.), Sec. 413, and note; Ib., Secs. 210, 211, 213; Craft v. Thompson, 51 N. H., l. c. 540; McKenzie v. Mathews, 59 Mo., l. c. 102; Cooper v. French, 52 Iowa, 531.) 'The allegation of a conclusion of law raises no issue, need not be denied, and its truth is not admitted by a demurrer to the complaint containing it.' (Kittinger v. Buffalo Traction Co., 54 N. E. 1081; see also 12 Ency. Pl. and Prac., 1022, et seq.; Institute v. Bitter, 87 N. Y. 250; Hoester v. Sammelmann, 101 Mo., l. c. 624.)

"To the same effect are Hand v. St. Louis, 158 Mo., l. c. 212, 213; State ex rel. v. Aloe, 152 Mo. 466; Martin v. Castle, 193 Mo., 183."

In Southern Ry. Co. v. King, 217 U. S. 536, l. c., the Supreme Court of the United States, speaking through Mr. Justice Day, said:

"The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution, and a direct burden upon, and impedes interstate traffic and impairs the usefulness of defendant's facilities for that purpose; that it is impossible to observe the statute in carrying mails and in interstate commerce business. But these averments are mere conclusions. They set forth no facts which would make the

116 operation of the statute unconstitutional. They do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful operation. For aught that appears as allegations of fact in this answer the crossing at which this injury happened may have been so located and of so dangerous a character as to make the slackening of trains at that point necessary to the safety of those using the public highway, and a statute making such requirement only a reasonable police regulation, and not an unlawful attempt to regulate or hinder interstate commerce. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense and that the demurrer thereto was properly sustained."

The rule announced in the foregoing quotation from the Supreme Court of the United States applies to petitions as well as answers, and discloses that said court, in construing Federal statutes like the one under consideration here, requires the pleadings to state facts, and not conclusions of law. Tested by this authority, the original

and amended petitions in the case at bar, in our opinion, fail to state any cause of action whatever.

In Willard v. Zehr, 74 N. E. 109, l. c., the Supreme Court of Illinois said:

"We concede that it is never necessary for a party to plead the evidence of facts averred, but enough of the facts themselves
117 relied upon as sustaining the cause of action or defense must be alleged to enable the Court to determine their sufficiency. It is also urged that the objections to the plea could only be raised by special demurrer, and that the particular grounds assigned were insufficient. The objections above pointed out go to the substance of the plea, and certainly could be reached by general demurrer. In fact, the general rule is that all objections to pleas of this kind, whether of form or substance, can be raised by a general demurrer. Finch v. Galigher, 181 Ills. 625; 54 N. E. 611.

The Circuit Court did not err in sustaining the plaintiff's demurrer to the plea, and the Appellate Court properly affirmed the judgment."

Numerous other authorities can be found sustaining the principles announced in the foregoing quotations. The petition, as well as the amendment thereto, is wholly insufficient under the laws of the United States relied upon as a basis of recovery in this action; under the laws of Illinois, where the accident occurred; under the laws of the State of Missouri, where the defendant, in contemplation of law, resides; and under the rule announced in the Code and authorities of the State of Kentucky where this action is brought.

It cannot be said in this case that the complaint is good after verdict, unless the Court intends to hold that the mere statement of legal conclusions, without any issue of fact being tendered, will constitute a good cause of action after verdict. We know of no court which has gone to the extent of sustaining a petition under such circumstances when assailed for insufficiency at any stage of the
118 proceedings. We, therefore, insist that no cause of action has been stated, and that by reason thereof the judgment below should be reversed.

II.

Because, in considering the case, the Court, as shown by its opinion, overlooked and misconstrued the evidence disclosed by the record in respect to the alleged negligence of the engineer at the time and place of accident. Of course, Engineer Guess was in charge of the locomotive at the time deceased was run over and killed. But we submit that a careful examination of all the testimony, in connection with those facts of which the Court should take judicial notice and with the presumption of law which obtains in respect to the engineer's having properly performed his duty in the absence of evidence to the contrary, will disclose that there is not a syllable of legal evidence in the entire record which proves, or from which it could be inferred, that said engineer was guilty of any negligence whatever in his management or control of the locomotive and train

at Wolf Lake, on the morning of February 23, 1910, when plaintiff's intestate was killed.

The Court, in its opinion (see page 5 of this brief) said:

"The record fails to show any negligence on the part of the conductor, other than his act in continuing the train crew on duty longer than sixteen consecutive hours, but there was some evidence tending to show negligence on part of the engineer, from
119 which the jury had the right to determine whether it was a concurring cause of the intestate's death."

We likewise maintain that the Court, in its opinion, erred in construing the evidence and in reaching the following conclusion (see copy of opinion, page 7 of this brief):

"If appellee's right of recovery had depended alone upon her ability to show that her intestate's death was caused by the negligence of the engineer, there was, as we have seen, evidence conducing to prove such negligence."

In order that we may treat the Court fairly as to the conclusions which, from reading the record, it reached relative to the alleged negligence of the engineer, we will print in full what the Court said on this subject, and follow the same with quotations from the testimony of the witnesses just as it appears in the record.

On pages 5, 6 and 7 of this brief, the opinion, with respect to the foregoing matter, reads as follows:

"It appears from the testimony of the engineer himself that the intestate's death occurred under the following circumstances: When the train reached Wolf Lake, the intestate, whose place as flagman was at the front end of the train, was notified by the engineer that it would stop over at that place on account of the sixteen-hour law. The intestate was then in the cab of the engine and he at once stepped out of the engine and along the foot board from which he got to the ground ahead of the engine, for the purpose of throwing a switch that the train might be side-tracked. Although in view of the engineer all the time, the latter admitted he did not
120 look to see where he was or what he did. Very soon after the intestate left the engine the engineer observed the Wolf Lake telegraph operator excitedly signaling him to stop the train, which was then moving at the rate of three or four miles an hour. The engineer immediately stopped the train and, upon stepping off the engine, was told by the operator he had run over the intestate, whose body he found under the tank wheel, cut in two.

In reply to the direct question, 'How was he killed?' the engineer said, 'Performing his duty; going out to set a switch.'

According to the testimony of the operator, Loper, who seemed to be the only eye-witness to the accident, the intestate left the engine as described by the engineer and ran toward the switch but fell between the rails before reaching it. He then got upon his hands and knees, but before getting to his feet was run over by the engine. When he fell the operator began signaling the engineer to stop the train, but the latter failed to observe the signals in time to stop the engine before it ran over the intestate.

There was no proof that the manner in which the intestate approached the switch was not the usual and an ordinarily safe way of doing so and of setting the switch; and as he was in plain view of the engineer from the time he left the engine, or would have been if the engineer had maintained a lookout in that direction, the latter, knowing he was going in front of the engine, should have kept such lookout for his movements; had he done so there was nothing to prevent his seeing him fall, and with the train going at only three or four miles an hour the reversal of the engine and application of the air brakes might, and in all probability would, have
121 stopped the train in time to enable the intestate to regain his feet and make his escape."

Plaintiff took the deposition of Engineer Guess, and read the same as part of her case in chief. By referring to page 12 of the printed record filed by appellant in this cause, it will be found that said testimony reads as follows (the bold faced type is ours):

"Q. 20. How was he killed?

A. Performing his duty, going out to set a switch.

Q. 21. Just detail the manner as it occurred, as you know it.

A. As I came into Wolf Lake, when I whistled for town, brakeman asked me if I were going to head in at Wolf Lake. I told him yes, that we had to get in on account of the sixteen-hour law. He got up, went out at the front window on the left side of the engine along the foot board, and the **next** thing I seen was the operator at Wolf Lake very much excited in giving a stop signal. I stepped off of the engine, asked him what was the matter, He said, 'My goodness, you have run over the brakeman.' I went looking for him, found him under the left tank wheel, cut in two.

Q. 22. The brakeman referred to here was whom?

A. McWhirter.

Q. 23. How was your train known, by what name?

A. Extra South 503.

Q. 24. **Did you know this brakeman was in front of the engine?**

A. No, sir.

Q. 25. Did you see him go out of the cab window?

A. I seen him go out of the cab window, **that is all.**

Q. 26. What did you suppose he went out of the cab window for?

A. He is **supposed** to get out there to open the switch. **I suppose** that is what what he went out there for.

122 Q. 27. **Was it his Duty to throw the switch in front of the window or not?**

A. No, sir; it wasn't his place to throw it in front of the window. He wasn't supposed to go out on that pilot?"

Plaintiff had taken the deposition of Engineer Guess, and, of course, knew what the deposition contained when she read it in evidence. The foregoing facts were not brought out upon cross-examination, but were proved by plaintiff as a part of her case in chief. By all of the rules of evidence she is bound by this testimony as it stands uncontradicted in the record. She could not have been taken

by surprise at such testimony, for it was on file in the cause to be used in the trial of her case.

As above indicated, the record discloses that the engineer did not know plaintiff's intestate was in front of the locomotive after he left the engine cab. From the time of his leaving the cab window, the engineer never saw him again until he found him under the left tank wheel. But this was not all. The engineer, at the instance of plaintiff, said (see page 14 of printed record):

"I was not working steam when he was killed. The engine was drifting. Understand, shut off, there would be no leak there."

He further testified:

"Q. 38. Had anything been the matter with the engine on this trip?

A. No, nothing at all."

Cross-examination of Engineer:

Upon cross-examination, Engineer Guess testified as follows (see page 15 of printed record):

"Q. 5. Was the throwing of the switch in front of the
123 engine a part of Mr. McWhirter's duty as brakeman?

A. Yes, sir; it was.

Q. 6. When was the first time that you knew of this unfortunate accident?

A. When Mr. Roberson told me what had happened."

The engineer further testified, on cross-examination (p. 16 of printed record):

"Q. 2. Do you know anything about how this accident happened, except from the fact that the telegraph operator told you that something was wrong?

A. I do not."

In respect to this matter, the testimony of R. A. Roberson, telegraph operator at Wolf Lake, reads as follows (see page 17 of record):

"Q. 8. Just tell what you know about the accident that happened at Wolf Lake on that morning.

A. As I was sweeping out the office I heard an engine coming. I looked out of the window and saw it was an extra south—saw it was a train coming south; didn't know it was an extra. I seen they were stopping and I wondered what they were stopping for and went ahead sweeping. When they came in closer to the office I went out and was standing on the platform. **I saw a man leave the cab window and come down the left running board and came down to the pilot, and as it was nearing the switch he left the pilot and struck the ground running and the next I saw he fell face downward between the rails. I next saw him on his hands and knees.** After that I turned my eyes to the engineer and did not see him any more, giving the engineer a stop signal. When

he came to a stop I told the engineer something, but I do not remember what I told him, but that was the last I saw of
124 the brakeman until he was taken from under the tender of the engine.

Q. 9. Was this brakeman McWhirter?

A. As far as I know.

Q. 10. It was the brakeman on extra 503?

A. It was the brakeman on extra 503; yes, sir.

Q. 11. Was he dead when he was taken out from under the engine?

A. Yes, sir."

On cross-examination, Operator Roberson testified as follows (p. 19 of record):

"Q. 3. **How far did the train run before the engineer stopped it after you notified him of this trouble?**

A. **I suppose about the length of an engine, maybe not quite so far, maybe a little farther, I don't remember.**"

He further testified:

"Q. 5. How far was he (deceased) from in front of that engine when he fell?

A. That is pretty hard for me to judge, because **he was in line of the engine and myself.**

Q. 6. How far was it from where he fell to the switch which he was called on to turn?

A. Perhaps three or four car lengths, maybe not so far."

Witness stated that the cars were from thirty to thirty-six feet in length.

"Q. 9. **Now, when you saw him fall, how far was he from this switch?**

A. **About three car lengths.**"

On redirect examination by plaintiff, witness Roberson said (see pages 19 and following of printed record):

"Q. 1. You say that at the time McWhirter fell he was in line with you and the engine. Explain what you mean by that?
125 A. In direct — with me—between where I stood and where he got off, putting me in direct line with him and where he got off. I can't tell whether he was ten, twenty, or how far he was from the engine.

Q. 2. **You mean, if I understand you, that the train was coming towards you and he stepped off between you and the engine, is that correct?**

A. **That is correct.**"

Conductor Loper testified (p. 23 of record):

"Q. 8. How fast was that train going at the time this accident happened?

A. It couldn't have been going more than two miles an hour because they stopped at an engine's length."

On redirect examination by plaintiff, the conductor testified (p. 23 of record):

"Q. 3. How could you tell the speed your train was going at the time McWhirter was killed, if you don't know when he was killed?
A. Well, you can tell that by the space you went after the accident occurred.
Q. 4. You went how far?
A. About an engine's length or car length; in other words, practically the same.
Q. 5. Do you mean you went about a car length over the body?
A. Yes, sir."

The deceased had been engaged in the railroad business with the defendant company for thirteen years (Abst., p. 25), and must have been an experienced railroad man. The foregoing testimony adduced by plaintiff in chief, and which is clearly binding upon her in this proceeding, discloses that the engineer was not aware of the fact that plaintiff's husband was in front of his locomotive at the time and place of accident. He simply saw plaintiff's
126 husband when the latter left the cab window, and observed him no further until he was found under the left tank wheel. As shown by the operator, the deceased passed along on the left-hand side of the locomotive, which would be the side opposite that occupied by the engineer, and from there passed on to the pilot. It would seem from the operator's testimony that the deceased must have ridden some distance on the pilot, and that as he neared the switch, he got off the pilot running and started forward to set the switch. He must have fallen shortly after leaving the pilot, and while the engine was very close to him, as he only had time to get on his hands and knees before the engine caught him, although it was only going two or three miles an hour. This evidence is uncontradicted.

The testimony of the engineer is corroborated, because he must have been at his post of duty and on the lookout down the track, as he saw the signal to stop given by operator Roberson, and did stop within forty or fifty feet after receiving said signal. The Court, in its opinion, said the deceased was in plain view from the time he left the engine until he was killed. This, we think, is in direct conflict with the testimony of the engineer as adduced by plaintiff, and especially when considered in the light of the other circumstances connected with the accident.

We have found the original locomotive No. 503 (Record, p. 27), and here print photographs of same taken upon the engineer's side and likewise upon the side of the fireman. The most casual examination of these photographs will disclose that an engineer either standing or sitting at his regular post of duty on the right-hand

side of the locomotive going south, could not see a man
127 ahead of him on the track until the latter was some distance
in front of the engine. Since the decision in this case, we have caused a test to be made, and we are informed that even if the engineer had been standing in the cab looking down the track, through the front cab window, he could not have seen McWhirter unless he was at least thirty (30) feet in front of the engine at, or before, the time he was struck.

As there are numerous locomotives passing through Frankfort, we ask the Court, if it has any doubt as to the actual obstructions in the locomotive itself which would be in the way of the engineer's seeing the deceased at the time he was struck, to cause a test to be made, or at least to observe closely any locomotive which may be within its reach. We have no doubt that the Court did not bear in mind these instructions which were in the way of the engineer, when it said, in its opinion, that deceased was in plain view of the engineer from the time he left the cab window until he was killed.

The engineer swore positively that he did not know deceased was in front of the locomotive, and likewise testified on part of plaintiff that it was not the duty of the deceased to throw the switch in front of the window, and that he was not supposed to go out on the pilot. In other words, the engineer testified that it was the duty of the deceased to have gotten out on the ground, outside of the track, and performed his duty in that way. However, no testimony was needed upon this point, as the Court must take judicial notice that it would be dangerous for a brakeman to step in front of a moving locomotive in close proximity thereto, and either walk or run down the track ahead of said moving engine, when he could perform his
duty equally as well, if not better, by taking a safe position
128 on the outside of the track in going to set the switch. Hence, we say that from the evidence adduced by the plaintiff, the engineer was not aware of the presence of the deceasd in front of his locomotive, did not see him, did not expect him to be there, and could not have seen him, had he looked, because of his position in the locomotive and the obstructions surrounding the parties at the time of the accident.

The engineer testified that at the time plaintiff's husband was killed, he (deceased) was performing his duty by going out to set the switch (Abst., p. 12). Of course, the deceased was properly in the engine cab and properly got out to go and set the switch. He was performing his duty up to this point. But the engineer testified that it was not the duty of plaintiff's husband to go upon the pilot and that he was not supposed to be there. If the deceased was not expected to be in front of the locomotive while it was moving, and as the engineer, at the instance of plaintiff, testified that he (deceased) was not seen by him in front of the engine and that he did not know deceased was there, without any evidence to the contrary, it would be doing the engineer an injustice to assume that he was so inhuman as to run over his companion, had the latter been in view at the time he was killed.

We, therefore, insist that there is not a scintilla of evidence, which

either proves, or tends to prove, that the engineer at the time and place of accident was guilty of even the slightest negligence. It would need no testimony to establish the fact that the deceased should have gotten outside the track and gone along the same a safe distance to perform his duty. There is nothing to indicate that he could not have done so, and, according to the testimony of
129 the engineer, as shown by plaintiff, he was not expected to be on the track in front of a moving locomotive. Our demurrer to the evidence in respect to this branch of the case should, therefore, have been sustained.

III.

Because the Court erred in holding that plaintiff's instruction marked "C" (p. 34 of Record) properly declared the law. Said instruction reads as follows:

"C."

"The Court instructs the jury that if you shall believe from the evidence that the train on which the decedent, Etwal McWhirter, was employed at the time of the accident which caused his death was engaged, or employed, in interstate commerce, and if you shall further believe from the evidence that the death of the said Etwal McWhirter resulted from the negligent and wrongful acts of the conductor, engineer, or servants of the defendant, superior in authority to the said Etwal McWhirter, you will find for the plaintiff such damages as you may believe from the evidence that she has sustained, not to exceed, however, the sum of $25,000."

If we are correct in regard to the facts aforesaid, this instruction is clearly erroneous. There was no evidence adduced at the trial sufficient in law to convict the engineer of any negligence whatever at the time and place of accident. As this instruction is complete within itself and authorizes the jury to return a verdict for plaintiff if certain facts are found, the cause should be reversed, if said instruction is erroneous, as there is nothing to indicate which ground of negligence the jury based its verdict upon.

130 IV.

Employers' Liability Act of 1908.

Because the Court erred to the prejudice of appellant in its construction of the Federal Employers' Liability Act of 1908 (35 U. S. Stat. at Large, 65, Chap. 149), as applicable to the facts and pleadings disclosed by the record in this cause. In this connection, we desire to point out what we conceive to be a correct analysis of the foregoing act.

(*a*) The rule of the common law prohibiting the recovery of damages by an employé from the master for injuries occasioned by the negligence of a co-servant or co-employé, as applied to railroads, is abolished by the foregoing act, and what is commonly known as a "Fellow Servant Law" enacted to take its place in respect to all mat-

ters coming within the purview of said act. The act in question reads, as follows:

"Every common carrier engaged in trade or commerce * * * between the several states * * * shall be liable to any of its employés * * * for all damages which may result from the negligence of any of its officers, agents or employés."

In other words, under the Employers' Liability Act of 1908, the servant injured by a fellow servant was simply placed upon the same plane with reference to the principal, which he would have occupied had he been injured by the president or some superior officer with whom the injured party was not a co-servant, while said president or chief officer was performing some duty which the company owed to its employés. Leaving out of consideration sections 3 and 4 of said Employers' Liability Act of 1908, contributory
131 negligence or assumption of risk would still be a complete defense, if the facts were sufficient to show either.

(*b*) Under the authorities cited by the Court in its opinion, as well as many others which might be cited upon the same question, it is held that by said Employers' Liability Act of 1908, the railway company is made an insurer of the safety of its employés as against any negligence of the company "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." It was supposed that the articles above enumerated covered all the equipment and appliances with which the servant might come in contact while performing his duties.

Without any reference to the above act, it was the general duty of the master at common law to use reasonable care in the selection of suitable and safe instrumentalities with which the servant was required to work, and to exercise reasonable care to see that he was furnished a safe place in which to work. Now, as the instrumentalities and place were required to be furnished by the master at common law, the courts, from a humanitarian point of view, and possibly through judicial legislation, have seen fit to advance one step further and make a railroad company an insurer against damages occasioned by its failure to furnish such safe and suitable appliances as are enumerated in section 1 of said act.

It was surely not the intention of Congress to make the railway company an insurerer as against any personal negligence of the engineer while performing his ordinary duty and which did not pertain to any defect either in the place or the appliances
132 with which the servant was required to work.

We therefore conclude that the plaintiff, having alleged that the death of her intestate resulted from the negligence of the engineer, would be required to show the same class of actual negligence on part of said engineer at the time and place of accident as would be required at common law if suit had been brought on account of the failure of the master to furnish a safe place or safe instrumentalities with which to work. In other words, the plaintiff would be compelled to allege and prove actual negligence upon the part of the engineer which was the proximate cause of the death

of her intestate before a right of recovery could be predicated upon this branch of the law.

(c) Section 3 of the Employers' Liability Act of 1908 cuts off the defense of contributory negligence, and section 4 takes away the defense of assumption of risk in all cases where the provision of the act with reference to the furnishing of proper appliances, equipment and instrumentalities has not been observed, and the servant is injured by reason of said defective equipment and appliances. Said sections 3 and 4, however, only apply to actions which are brought under the provisions of the Employers' Liability Act of 1908, supra.

(d) In all cases like the one at bar, the plaintiff is required to show by actual and positive evidence that the engineer was guilty of negligence which directly or proximately caused the death of the intestate, if said plaintiff relies upon matters which do not comprise the appliances and equipments mentioned above.

We insist that there was no legal evidence adduced at the trial which tended to show that the engineer was guilty of any negligence whatever at the time and place of accident, much less any
133 which was the proximate cause of the death of plaintiff's husband. On the other hand, the deceased himself was guilty of gross negligence in getting out of the cab onto the pilot and then running between the rails in front of a moving engine without reason or excuse therefor, and when he had a safe way of doing said work by passing along the tracks outside the rails until he came to the switch. In other words, deceased had a safe place in which to walk and could have performed his duty in safety without going between the rails. Having selected the more dangerous course, with full knowledge of the facts and the risks assumed, he was guilty of contributory negligence.

I Bailey on Personal Injuries Relating to Master and Servants, 1121 et seq.
Gilbert v. Railway Co., 128 Fed. Rep., 534, l. c. (Minn.);
Pa. Co. v. Shaughnessy, 122 Ind. 588; s. c. 23 N. E. 675;
Moore v. Railway Co., 146 Mo., 572; s. c. 48 S. W. 487;
Smith v. F. N. Box Co., 193 Mo., l. c. 737;
Hirsch v. Bread Co., 150 Mo. App., l. c. 174;
I White on Personal Injuries on Railroads, Sec. 140, and cases cited.

It is manifest that Congress, in passing the Safety Appliance Acts, had in view the danger to employés who had to go upon railroad tracks in front of moving trains to perform their duties, and hence required railroad companies to see that their ap-
134 pliances and equipments were in good condition. It was, therefore, clearly intended by Congress that the employé should not voluntarily and unnecessarily, as did plaintiff's husband in this case, take his life in his own hands by deliberately walking or running in front of a moving train, when he could have walked in safety by the side of the track, and performed his duty.

Hence, under section 3 of said act, even if there had been any

evidence of negligence on the part of the engineer at the time and place of accident, the appellant was entitled to have the jury instructed that the damages, if any, sustained by the plaintiff should be diminished in proportion to the amount of negligence attributable to the deceased, as aforesaid.

Plaintiff's instruction "C" (Record, p. 34) completely ignored the contributory negligence of the deceased, and authorized a verdict for whatever damages the jury thought plaintiff had sustained, without any diminution of same, if deceased were found to have been guilty of negligence at the time and place of accident.

We have never understood the law to be that, if plaintiff's instruction as to the class of damages which he or she is authorized to recover and as to the amount of recovery is erroneous and predicated upon a false idea of the law, it would be cured by a failure of the defendant to ask an instruction upon that subject. It is said, however, in the opinion, that the judgment might be affirmed because the damages were not excessive and that three thousand dollars was a very reasonable verdict.

We do not think the cases cited by the Court apply to the facts of this case. If there had been any evidence tending to
135 show negligence upon the part of the engineer at the time and place of accident, the jury would have been compelled under the law to take into consideration the acts and conduct of the deceased, and to diminish the damages in proportion to the amount of negligence attributable to the deceased. In other words, if the jury had been properly instructed, they could readily have reached the conclusion in the case at bar that the entire blame for the death of plaintiff's intestate was with the latter and not due to any fault of the engineer. At any rate, the jury might have concluded, if properly instructed, that the result was brought about practically on account of the negligence of the deceased, while the alleged negligence of the engineer only remotely contributed thereto.

We, therefore, insist that in this class of cases the Court cannot apply the law of affirmance on account of the smallness of the verdict.

V.

Because the Court misconstrued the Employers' Liability Act of 1908, and erred in holding that appellant was an insurer as against the act of the engineer in running over deceased at the time and place of accident.

The cases cited in the opinion, as well as all others which we have been able to find upon this subject, simply hold the defendant as an insurer where the injury is caused "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

In all the cases holding as above in which there was a trial, the

record discloses that the injury was occasioned by reason of
136 some one or more of the defects or insufficiencies noted above.

We have seen no decision, or even intimation, of any Court to the effect that the personal acts of an engineer in the operation of a train by which an employé is injured make the Railway Company an insurer against such negligence.

As heretofore pointed out, according to our conception, Congress was simply undertaking to adopt a Federal fellow-servant law, similar in many respects to those adopted by the various States of the Union, by repealing the common law in that regard and making a railway company responsible for its negligence in failing to provide suitable and safe machinery, appliances, etc. So far as all other negligence chargeable against a railway company is concerned, than that of furnishing defective appliances, etc., the defense of contributory negligence, if shown, should be considered, and the damages, if any, sustained should be diminished in proportion to the amount of negligence attributable to the injured employé.

On the other hand, if an employé, with full knowledge of all the facts and of the dangers to be apprehended, should get off a pilot and walk down a track in front of a moving train, as did deceased in the case at bar, and, while doing so, should accidentally fall and be killed by the train, it should be held that he assumed all risk of injury in attempting to perform his duty in this manner, and no right of action can be sustained by his legal representative.

137 Jackson v. Railway Co., 104 Mo., 448;
Roberts v. Mo. & Kans. Tel. Co., 166 Mo., 370;
Arnold v. L. & N. Ry. Co., 58 S. W. 370 (Ky.);
Melott v. L. & N. Ry. Co., 40 S. W. 696 (Ky.);
Bogenschutz v. Smith, 84 Ky. 330 (1 S. W. 578);
Am. Rolling Mill Co. v. Hullinger, 67 N. E. 989; l. c. (Ind.);
Am. Rolling Mill Co. v. Hullinger, 69 N. E. 460 (Ind.);
Baumler v. N. Brewing Co., 50 Atl. 841 (R. I.);
Stafford v. Railway Co., 114 Ill. 244 (2 N. E. 185);
Norfolk, Etc., Ry. Co. v. Jackson's Admr., 85 Va. 489 (8 S. E. 370);
Schlemmer v. Railway Co., 205 U. S. 12, l. c.;
I Bailey's Personal Injuries Relating to Master and Servant, Secs. 938 and 944.

In view of the authorities above cited, we contend that, on the undisputed facts, the appellant was not an insurer of deceased at the time and place of accident under the Employers' Liability Act; that under the circumstances detailed in the record, he assumed the risks of injury by performing his work as he did; and that his legal representative cannot maintain this action under said Employers' Liability Act of 1908, or under any other statute, as we shall attempt to show hereafter.

Section 4 of the Employers' Liability Act of 1908 merely attempts to cut off the defense of assumption of risk where the violation of

some statute enacted for the safety of employés contributed
138 as a proximate cause to the injury or death of such employé.

Hence, we insist that the alleged wrongful and negligent act of the engineer in running over the deceased at the time and place of accident did not deprive appellant of its right to assert the defense of assumption of risk by deceased under the circumstances shown in the record.

(*a*) Plaintiff's instruction "C" (Record, p. 34) ignores the law in respect to said assumption of risk, and hence does not properly declare the law, even if there had been any legal evidence tending to show negligence upon the part of appellant's engineer.

VI.

Because the Court erred in holding that there was any legal evidence shown at the trial with reference to the conduct of the engineer at the time and place of accident, which operated as a proximate cause of the death of plaintiff's husband.

In other words, deceased voluntarily assumed to do his work by passing between the rails in front of a slowly moving engine in broad daylight instead of walking outside of the rails, and, without the semblance of fault upon the part of the engineer, accidentally fell and lost his life. The engineer swore he did not know deceased was in front of his engine, and the photographs corroborate him as to his view having been cut off at the time deceased was killed. There is no evidence which discloses how close deceased was to the
139 locomotive from the time he left the pilot until he was killed.

There is not a syllable of evidence to show that he was a sufficient distance from the engine, so that the engineer's view of deceased was not cut off from the time he left the pilot until he was killed. The Court cannot indulge in pure conjecture for the purpose of convicting the engineer of negligence in the face of his positive testimony that he was not aware of the presence of the deceased in front of his train at the time the latter was killed, in connection with the presumption of law which obtains in his behalf, that he did his duty. The photographs and physical facts corroborate the testimony of the engineer in respect to his inability to see deceased after he went upon defendant's track. The testimony of the operator discloses that the engineer was on the alert, and was looking down the track, as he took the signal from the operator immediately upon its being given, and stopped the train as soon as possible.

The verdict of the jury, if based upon the alleged negligence of the engineer, should not be permitted to stand, as there is no testimony, aside from mere conjecture, that deceased was in view of the engineer or known by the latter to be upon the track. The positive testimony is all to the contrary.

It would require no expert testimony to establish the fact that trainmen are not expected or required to pass between the rails in performing their duties, when a safe place is open to them on the outside thereof. The very purpose of the congressional acts is to

make it unnecessary for the employés to be there under such circumstances, and hence it cannot be conjectured or presumed that deceased was properly between the rails under the conditions detailed in this case. The verdict of the jury, therefore, in our opin-
140 ion, is based purely upon conjecture, and should not be permitted to stand.

Louisville Gas Co. v. Kaufman, S. & Co., 105 Ky., 156, s. c. 48 S. W., 434, and cases cited;

L. & N. Ry. Co. v. Guest's Admr., 106 S. W., 817 (Ky.);

Warner v. Railway Co., 178 Mo., 134, l. c., and numerous cases cited.

In L. & N. Ry. Co. v. Guest's Admr., 106 S. W. 818, Judge Hobson states the law in respect to such matters very clearly, as follows:

"The rule is that, if the evidence shows that the injury may have resulted from either of two or more causes, only one of which was due to the defendant's negligence, and the inference that the injury resulted from one cause is no stronger than that it resulted from the other, the plaintiff has failed to make out his case."

In Warner v. Railway Co., 178 Mo. 134, l. c., Judge Marshall, speaking for the Supreme Court of Missouri, said:

"In other words, the mere concurrence of negligence and injury does not make the defendant liable. There must be a direct connection between the negligent act and the injury, and the negligence must be the proximate cause of the injury. (Reed v. Railroad, 50 Mo. App. 504; Stepp v. Railroad, 85 Mo. 229; Moberly v. Railroad, 17 Mo. App. 518; Stoneman v. Railroad, 58 Mo. 503; Harlan v. Railroad, 65 Mo. 22; Nolan v. Shickle, 3 Mo. App. 300, s. c. 69 Mo. 336; Settle v. Railroad, 127 Mo. 336; Kennayde v. Railroad, 45 Mo. 255; Stanley v. Railroad, 114 Mo. 606.)

141 "If the injury may have resulted from one of two causes, for one of which and not the other, the defendant is liable, the plaintiff must show, with reasonable certainty, that the cause for which the defendant is liable produced the result, and if the evidence leaves it to conjecture, the plaintiff must fail in his action. (Smart v. Kansas City, 91 Mo. App. 586; Epperson v. Telegraph Co., 155 Mo. 346; Smith v. Bank, 99 Mass. 605; Searles v. Railroad, 101 N. Y. 661; Peirce v. Kile, 26 C. C. A. 201.)

"In addition, therefore, to the fact that the evidence wholly fails to support the acts of negligence charged in the petition, the proofs and physics of the case wholly fail to show any casual connection between the negligence charged and the injury, and the facts disclose that the injuries may have occurred from other causes than the negligence of the defendant charged."

The verdict of the jury in the court below was based purely upon conjecture as to plaintiff's husband and the other members of the crew having worked sixteen hours and five minutes consecutively from the time they left Illmo, Missouri, until the death of plaintiff's husband at Wolf Lake, Illinois, on the morning of February 23, 1910. It was mere conjecture that deceased was ever in sight of the engineer after he got out of the front window on the left-hand side

of the cab and went down on to the pilot as testified to by the telegraph operator. The testimony of the engineer is positive to the effect that he never saw deceased from the time he went out of the cab window until he was found under the left tank wheel. Both the engineer and the operator testified that, as soon as the operator signaled the engineer to stop, he did so in a remarkably short
142 time. He must have been looking down the track or he would not have received and acted upon the signal of the operator so quickly. It cannot be inferred that the engineer would wilfully run over his companion if he saw him in front of the train in a helpless condition.

The testimony of the engineer, as shown by the plaintiff, discloses that the deceased had no right to perform his duty by passing between the rails in front of the moving locomotive, and that he was not expected to set the switch in this manner. The Acts of Congress have had in view the prevention of employés from going upon the tracks under such circumstances by compelling railroad companies to provide safety appliances, with automatic couplers, etc. There was nothing to indicate that deceased could not have performed his duty as well by traveling down the outside of the tracks until he came to the switch. There is no claim that he was fatigued or fell by reason of exhaustion; neither is any similar charge made in the petition or intimated in the record from one end of the case to the other. The jury, therefore, if they found that the engineer was guilty of negligence at the time and place of accident, did so purely upon conjecture, and without any substantial evidence on which to predicate such a verdict, although the positive evidence of the engineer was to the contrary and is supported by the surrounding conditions as shown by the photographs and other physical facts connected with the case.

We think it perfectly plain that deceased, who had been in the railroad business for thirteen years, and who must have been thoroughly conversant with railroad matters, had gotten out on the left side of the pilot and had ridden there until he came
143 within a few car lengths of the switch which he proposed to set; that he was then seen by the operator to leave the locomotive running toward the switch, and, as he did so, fell in such a way as to be unable to arise before the locomotive ran over him. It is evident that the deceased must have been close to the engine, or he could have gotten up after falling, and could have been seen by the engineer, who, as above shown, was looking in that direction. The engineer truthfully said that he was not aware that deceased was in front of his locomotive between the rails, and had no reason for apprehending that he would be there, when his duty required that he should be elsewhere.

Therefore, unless this Court is willing to affirm this judgment upon mere conjecture, we think it should be held, as a matter of law, that there was no legal evidence adduced at the trial sufficient to warrant the conclusion that the engineer was guilty of any negligence whatever at the time and place of accident, which either caused, or contributed to cause, the death of plaintiff's husband.

VII.

Hours of Service Act (34 U. S. Stat. at L. 1415, 1416, c. 2939).

Because the Court, in the opinion of counsel for appellant, in the consideration of this case has misconstrued and erroneously applied the principles of law involved in the above act to the case at bar.

We insist that the appellant was not an insurer under the above act, and we are further of the opinion that the sixteen-hour law, supra, has no application whatever, either directly or inferentially, to the facts in this case.

144 The Court, in its opinon (see page 5 of this brief), said:

"In thus requiring of the intestate more than sixteen consecutive hours of service, albeit the excess of service over the sixteen hours was but five or seven minutes, appellant violated the statute, supra; and as the death of the intestate, from the act of its engineer complained of, occurred while he was engaged in the required continuous service and after the expiration of the sixteen consecutive hours allowed by the statute, there seems to be no escape from the conclusion that the act of appellant in thus extending his service beyond the statutory limit was negligence per se, to which the intestate's death must, as a matter of law, be attributed, and, if so, the right of appellee to maintain this action cannot be questioned."

If the conclusion of the learned Judge as to the meaning of the above act is correct, and if the statement of facts contained in the above quotation is borne out by the testimony, then it disposes of that branch of the case. But as there were two separate and distinct grounds of negligence pleaded in the petition, one based on the Employers' Liability Act and the other on the Sixteen-Hour Law, supra; and as both grounds of negligence were attempted to be submitted to the jury by respective instructions; and as the verdict of the jury is general in its terms, it would be impossible to say from the record whether the jury returned its verdict on both grounds of negligence, or whether it simply found on one or the other. If either should be held to be erroneous, it would necessitate the reversal of the cause, by reason of the fact that this Court cannot determine which ground of negligence was made the basis of recovery by the jury.

145 We shall undertake to demonstrate, however, that the Hours of Service Act has no application to the facts of this case. The evidence disclosed, without contradiction, that the train left Illmo, Missouri, at 3:30 p. m., February 22, 1910 (Abstract, pp. 11-20); that there were nine empty cars in the train when they left Illmo; that they were to go to Bush, Illinois, as the terminus of their route for the purpose of obtaining coal which was to be returned to Illmo (Abstract, p. 12); and that they got to Bush, Illinois, about 11:30 p. m., on February 22, 1910 (Loper's evidence in chief, Abstract, p. 21). According to Loper's testimony, they remained at Bush about one hour and thirty minutes (Abstract, p. 21), and according to the testimony of Engineer Guess, they remained there about an hour (Abstract, p. 12). The distance from Bush to Wolf

Lake was about thirty-five miles (Abstract, p. 27). The record then discloses, that the train crew must have left Bush for Wolf Lake at 12:30 or 1:00 o'clock a. m., on February 23, 1910, with six hours and thirty minutes in which to make thirty-five miles and still be within sixteen hours from the time they left Illmo.

There was no reason why this train, with only eight or nine loaded cars, without any switching to be done, as it was a special train, and with the locomotive, track, and all the appliances in good condition, as shown by the testimony, could not have traveled from Bush to Wolf Lake in three and a half hours, as this would only be allowing ten miles an hour. The Court should take judicial notice of the fact that, with everything in good order, ten miles an hour would be a very low rate of speed to fix for a small train like this.

146 There was not a syllable of evidence offered either showing, or tending to show, that the train crew did not rest at least three hours of this time, as it certainly was not necessary that the full time should be consumed in reaching Wolf Lake.

Going back, however, to the starting point at Illmo, it will be presumed, in the absence of evidence to the contrary, that the entire train, both going and coming, was furnished with automatic couplers and with air for the purpose of stopping as required by the Safety Appliance Acts of Congress. It will be presumed, in the absence of evidence to the contrary, that all of these requirements had been complied with. If this be true, we then have a special train with nine empty cars, with all the appliances in good order starting to Bush, Illinois, for the purpose of obtaining coal, which was to be returned to Illmo. What duty was there to be performed on the part of this flagman from the time he left Illmo at 3:30 in the afternoon of February 22d to the time when he got to Bush at 11:30? Here were eight hours in which he could have rested or slept in the caboose, and it was not shown that he had any duty to perform during this period. According to the testimony, they were only at Bush from an hour to an hour and a half. What was this flagman doing from the time they left Illmo until he was killed, when the record shows that the only work which was to be done took place at Bush, at which point they only remained an hour or an hour and a half?

Now, as this proceeding is in derogation of the common law, and as the petition in specific terms alleged that the deceased was required or permitted to remain on duty more than sixteen consecutive hours, and, as the Hours of Service Act, supra, simply provides for a prosecution where the evidence discloses that the servant was

147 actually on duty more than sixteen consecutive hours, the plaintiff has signally failed to make out a case on the merits, but, on the contrary, left the jury to conjecture as to defendant's violation of the law, although she had on the stand the engineer and the conductor, who presumably could have given all the facts, which would either have proved or disproved plaintiff's contentions in this regard.

It did not devolve upon the defendant to make out the plaintiff's case, and no presumption can obtain in behalf of plaintiff on account

of defendant's failure to cross-examine in respect to those matters which the plaintiff, by virtue of the statute, was required to show affirmatively as a part of her case in chief.

We, therefore, insist that there was no evidence adduced at the trial which warranted the submission to the jury of the charge that defendant had violated the sixteen-hour law in any respect.

VIII.

Hours of Service Act, Continued.

Because the Court, in our opinion, misconstrued the above act as applicable to the facts in this case, for the following reasons:

Section 3 of the above act should be construed in connection with section 2 and as a part of the entire act. While in suing in one State upon the statute of another it is necessary to plead, in specific terms, the statute, with all of its exceptions or provisos, relied upon, because such statutes do not have any extraterritorial effect, still this is not true with regard to an Act of Congress relating to interstate commerce, which is general in its terms.

The sixteen-hour law, supra, in regard to interstate com-
148 merce, is not only the law of Illinois, Missouri and Kentucky, but covers the entire area of the United States. It was, and is, a public act. It was not necessary either for the plaintiff or the defendant to plead this act, provided the facts stated in the petition brought the case within the purview of said law.

Plaintiff alleged that defendant violated said law by permitting and requiring her husband to work more than sixteen consecutive hours while engaged in interstate commerce. The answer specifically denied this charge (Abstract, p. 7), and likewise pleaded the specific facts showing how the deceased was killed (Abstract, pp. 7 and 8). After setting out said facts, it is alleged in the answer that the killing of plaintiff's husband was an accident and was unavoidable.

Section 3 of the above act, in express terms, states that the provisions thereof shall not apply

"in any case of casualty or unavoidable accident, or the act of God; nor where the delay was the result of a cause not known to the carrier, or its officer or agent in charge of such employé, at the time said employé left a terminal, and which could not have been foreseen."

The answer, as above indicated, charges, within the purview of said act, that plaintiff's husband was killed by reason of an accident and that it was unavoidable.

The undisputed facts, as shown by plaintiff's own witnesses, disclose that the train crew had six hours and thirty minutes after leaving Bush in which to make Wolf Lake, and in order to travel the distance between these two points the train would only have been required to go at the rate of five and one-half miles per hour. The

Court should take judicial notice, therefore, of the fact that
149 when the train left Bush, the officers and employés of the defendant in charge thereof had the right to assume that said crew could beyond peradventure make Wolf Lake before the expiration of the sixteen-hour period, as all of the appliances were in good order and the train a very small one. Bush was the terminal of the road, as they started from Illmo to Bush for the purpose of obtaining coal at the latter place.

In Great Northern Ry. Co. v. Walsh, 47 Fed. 409 (N. D.) it is said:

"The terminal point of an interstate shipment is the place of consignment, or the point at which the carriage of one common carrier ends, and that of another begins."

In II Bouvier's Law Dictionary, p. 587, a terminal is defined as follows:

"A boundary or limit of either space or time. * * * The starting point of a private way is so called. * * * The point of termination of a private way is so called."

It cannot be questioned that Bush, Illinois, was the terminal point, as shown by the record in this case. The train crew started for Bush for the purpose of obtaining coal there with a view of returning with it to Illmo. Bush then being the terminal point, and section 3 of the above act providing that the act should not apply

"where the delay was the result of a cause not known to
150 the carrier, or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen,"

can the Court, with any degree of reason, say that the servants of the defendant in charge of the train at Bush could have foreseen, when the crew left there for Wolf Lake, which was only thirty-five miles off, that the latter point could not have been reached in less than six hours and thirty-five minutes?

It has been said that the Courts should take judicial notice of those things which are generally known among people. There is no reason why the Court should not say, as a matter of law, that any prudent man would be warranted in believing that a train, with all of its appliances in good condition and only a small load to haul, could travel thirty-five miles in less than six and a half hours. If we are correct in this assumption, then the railway company, in starting the coal train from Bush to Wolf Lake as shown by the record, did not violate the provisions of the sixteen-hour law, supra.

The Court, in its opinion (see page 18 of this brief), states that defendant in its answer has not pleaded the proviso of the act, supra, as an excuse for not complying with the law. We take it that the proviso is simply a construction of the act itself, and, in express terms, provides that said act shall not apply under the circumstances detailed in said proviso. This being a public act, and the undisputed facts disclosed by the record being sufficient to bring the

case within its purview, it was unnecessary to plead this proviso as a defense, because the act itself did not apply.

In re Day, 181 Ills., 73, s. c. 50 L. R. A., 521;
Ga. Banking Co. v. Smith, 128 U. S., 181;
151 Carter-Webster & Co. v. U. S., 74 C. C. A., 397, l. c. (Md.);
Baggaley v. P. & L. Sup. Iron Co. et al., 33 C. C. A., 202 (Mich.).

In the case of In re Day, 50 L. R. A. 521, it is said:

"Now the office of a proviso is to qualify or limit the enactment itself, and not to enlarge the enacting clause. 'The office of a proviso, generally, is either to except something from the enacting clause (to qualify) to restrain its generality, or to exclude some possible grounds of misinterpretation of it as extending to cases not intended to be brought within its purview.' Potter's Dwarr. Stat. 118, note 11. It is intended to qualify what is affirmed in the body of the act, section, or paragraph preceding it."

In the case at bar, however, all of the evidence in respect to this matter is before the Court, and was given without objection. We see no difference in principle between the Court's considering the facts, which, as above stated, were given without objection as a part of plaintiff's case, and that class of cases in which, although contributory negligence is required to be pleaded, as an affirmative defense by the defendant, yet it is held that where such contributory negligence is shown by the testimony offered in behalf of plaintiff, the Court will determine the question in the same manner as though it had been affirmatively pleaded by the defendant.

Hudson v. Railway Co., 101 Mo., 13 et seq.

In the Hudson case, supra, the plaintiff alleged in his peti-
152 tion that he was injured on account of the negligence of the defendant, without any fault or carelessness on his part. The defendant denied this allegation. It was claimed in the Supreme Court on behalf of the defendant, that it was unnecessary to plead contributory negligence, as the plaintiff had tendered the issue in his petition, and defendant had denied that he was exercising due care at the time. The Court held that this doctrine was not sound, as it was not necessary for the plaintiff to plead facts showing due care, and hence it was necessary for the defendant, under ordinary circumstances, to plead affirmatively such facts as would indicate contributory negligence on part of plaintiff. The Court, however, in disposing of the case, announced the rule of law to be as follows:

"But while contributory negligence as a matter of defense has to be pleaded in order for a defendant to avail himself of it, by the introduction of evidence to sustain that issue, yet it does not thence follow that if the plaintiff's own testimony shows circumstances of contributory negligence which absolutely defeat his right of action and disprove his own case, that the defendant is not at liberty to take advantage of such testimony though produced by the adversary. On the contrary, it is well settled in this State as well as elsewhere that such advantage may be taken of the plaintiff's testi-

mony, regardless of whether the special defense be pleaded or not. Milburn v. Railroad, 86 Mo. 104, and cases cited; Schlereth v. Railroad, 96 Mo. 509."

We have attempted to demonstrate heretofore that the deceased lost his life purely because of an accident, without any fault on the part of any other person contributing thereto, and that hence the sixteen-hour law, supra, has no aplication. Especially is
153 this true, as the answer, in express terms, claimed that the death of deceased was due to an unavoidable accident. We have likewise attempted to demonstrate that on the undisputed facts the above act has no application, because the railway company was not bound to anticipate, when its servants left Bush, that Wolf Lake, which was only thirty-five miles off, could not be reached in six hours and a half.

IX.

Hours of Service Act, Continued.

Because, in the opinion of appellant's counsel, the Court misconstrued the above act in holding that a right of action could be maintained thereunder, on account of the provision of the Employers' Liability Act, supra, which authorizes a recovery for damages where any statute enacted for the protection of an employé has been violated.

The Employers' Liability Act of 1908, in plain, unequivocal terms, only provides for the prosecution of actions under or by virtue of any of the provisions of said act. As we have attempted to demonstrate, it is simply construed to make a railway company an insurer as to those appliances and equipments which are mentioned therein; it does not refer to the Hours of Service Act or any other similar enactment which does not relate in some manner to appliances and equipments.

On the other hand, the sixteen-hour law, supra, is purely a penal statute, and should be strictly construed.

Com. v. L. & N. Ry. Co., 66 S. W. 753 (Ky.), s. c. 112 Ky. 783;

154 18 Am. Dig. (Dec. Ed.), Sec. 241, p. 1019, and numerous cases cited.

Bates v. Sylvester, 205 Mo. 506-7, l. c.;
Broadwater v. Railway Co., 212 Mo. 437.

These authorities hold, and in our opinion rightfully so, that highly penal statutes, like the sixteen-hour law, should not be so extended as to make a railway company an insurer, unless the facts disclosed in the case are sufficient to bring them within the statute.

Said act should also be strictly construed, because no right of action for damages is given therein, aside from the penalty, which is to be recovered by the commonwealth. The statute is in derogation of the common law, and abolishes the fellow-servant rule as it existed at the common law. It is likewise in derogation of the

common law, because, under the latter, a personal right of action died with the person.

In view of the foregoing, it was the duty of the plaintiff, if she desired to rely upon the sixteen-hour law, to allege and prove that deceased was overworked and fatigued by reason of the violation of said law to such an extent that he was incapable of performing his duty properly at the time and place of accident, and, in consequence, fell and was killed under the circumstances detailed in evidence.

Lloyd v. Railroad Co., 66 S. E. 604 (N. C.).

In the case just cited, the facts stated were sufficient to show that the violation of the law contributed to the injury, because it was set out in the petition that deceased had been working more than twenty-three hours consecutively, without rest and without anything to eat, and that, by reason thereof, he was so weak and feeble as to be unable to climb up to the engine at the time
155 and place of accident. This case, of course, disclosed that the original negligence was the proximate cause of the injury, just as the cases cited by the Court in its opinion show that the violations of the Employers' Liability Act, in failing to furnish proper appliances and equipments, were the direct and proximate causes of the injuries sustained and sued for therein.

It will be noted, however, that in the Lloyd case, supra, the plaintiff was denied a recovery because the deceased participated in the violation of the North Carolina statute at the time he was injured, and the Court held that, by reason thereof, no right of action could be maintained.

Applying the same doctrine to the case at bar, we find that the deceased had notice of the fact, when he neared Wolf Lake, that the train was being taken in there in order to avoid the sixteen-hour law. If the time had expired, he was cognizant of that fact, and having continued to work thereafter, his legal representative should not be permitted to recover under said sixteen-hour law.

The sixteen-hour law, supra, is complete within itself. Congress had the right to withhold or to confer a right of action which did not exist at common law in cases of this character, as shown by the two cases from Missouri: Bates v. Sylvester and Broadwater v. Railway Company. The above act did not, in terms, provide for the survival of any right of action based upon the fellow-servant rule, nor did it provide for any right of action in any kind of a civil proceeding, except in respect to the recovery of the penalty provided for therein. If Congress had intended to make a railroad company an insurer as to any damages which might be
156 sustained by reason of the violation of said act, it would have so stated in express terms. We cannot believe that Congress intended that said act should make the railway company an insurer in cases of this character, and particularly where the case comes in any way within the several provisos contained in section 3 thereof. We do not believe that the act should be so construed as to make the railway company an insurer under any conditions; but that, if any civil action can be maintained at all thereunder, it

must be on the theory that the facts show a causal connection between the injury and the violation of the statute.

In the case at bar, even if the deceased had been on duty for more than sixteen consecutive hours—which we deny—yet the mere fact that he remained on duty five minutes over and above said sixteen-hour period, and was run over by the train, gives no right of action whatever, as there is nothing to show that the violation of said statute was the proximate cause of the injury.

In other words, the decision of the Court as it now stands would make the railway company an insurer under said sixteen-hour law, if the deceased had been overworked five minutes, and, at the expiration of that time, had been accidentally shot by an outsider, or killed by lighting. The cases relied upon by the Court to support its ruling are not sufficient to warrant it in going to the above extent. Those cases relied upon as violating the Employers' Liability Act, in every instance where a trial was had, affirmatively disclose that the defective appliance or equipment was the direct and proximate cause of the injury complained of.

In this case there is no causal connection whatever between the death of plaintiff's husband and the violation of said statute. We therefore, insist that the authorities heretofore cited in our
157 original brief are directly in point, and we reproduce the same as a part of this brief.

Cooley on Torts, pp. 68 to 71 inc.;
Broom's Legal Maxims, Sec. 215;
I White on Personal Injuries, Secs. 20 to 39, inc.;
Ray's Negligence of Imposed Duties (Personal), pp. 133-4;
III Elliott on Railroads (Orig. Ed.), Sec. 1310;
Beach on Contributory Negligence (2d Ed.), Sec. 31;
I Thompson's Commentaries on the Law of Negligence (2d Ed.), Sec. 45;
Webb's Pollock on Torts (Enlarged Am. Ed.), p. 29 et seq.;
Shearman & Redfield on Negligence (5th Ed.), Secs. 25 and following;
Watson on Damages for Personal Injuries, Secs. 33-35;
Logan v. Railway Co., 139 Ky. 202, s. c. 129 S. W. 575-577;
L. & N. Ry. Co. v. Long's Admr., 117 S. W. 359, 361 (Ky.);
Georgetown Tel. Co. v. McCullough's Admr., 80 S. W. 782 (Ky.);
Setter's Admr. v. City of Maysville, 69 S. W. 1074 et seq.;
Holman v. Ry. Co., 62 Mo. 564, l. c.;
Henry v. Ry. Co., 76 Mo. 288;
Sira v. Wabash Ry. Co., 115 Mo. 127;
Swearingen v. Ry. Co., 221 Mo. 644;
Atkinson v. Ry. Co., 90 Mo. App. 489;
Logan v. Ry. Co., 96 Mo. App. 461;
Fowlkes v. Ry. Co., 31 S. E. 464-5 (Va.);
Stone v. Ry. Co., 51 N. E. et seq. (Mass.);
Searle v. Ry. Co., 65 Texas 274;
McClary v. Sioux City, Etc., Ry. Co., 3 Neb. 44;
Cuff v. Ry. Co., 35 N. J. L. 10;

Rockford v. Tripp, 83 Ill. 347;
158 Renner v. Canfield, 36 Minn. 90, s. c. 30 N. W. 435;
A. T. & S. F. Ry. Co. v. Calhoun, 213 U. S. 1 (Ok.);
Scheffer v. Ry. Co., 105 U. S. 249 (Va.);
M. & St. P. Ry. Co. v. Kellogg, 94 U. S. 469 (Ia.);
Minn. St. Ry. Co. v. Odegaard, 182 Fed. 56 et seq. (Minn.);
Mella v. N. S. S. Co., 162 Fed. 499 (N. Y.);
Teis v. Smuggler Mining Co., 158 Fed. 260 (Colo.);
Gwyn v. Ry. Co., 155 Fed. 88 (Tenn.);
U. S. F. & G. Co. v. Bank, 145 Fed. 273 (Ia.);
Jarnagin v. T. P. A., 133 Fed. 892 (Tenn.);
Lauterer v. Manhattan Ry. Co., 128 Fed. 540 (N. Y.);
Cole v. G. S. & L. Society, 124 Fed. 113 (Utah);
Cinn. N. O. & T. P. Ry. Co. v. Mealer, 50 Fed. 725 (Tenn.).

Conclusion.

As stated in the opinion, this is a case of first impression and is of vital importance, not only to the railway companies, but likewise to their employés. If the doctrine contended for by plaintiff and sustained by this Court should be affirmed, it will practically make all railway companies insurers of the safety of their employés while engaged in interstate commerce, where said railway companies have been negligent in any respect, even though such negligence may not in any sense be approximate cause of the injury complained of.

In the State of Kentucky, as well as in Missouri, we have respective statutes which require that a railway company shall ring the bell or sound the whistle of its locomotives when ap-
159 proaching any public highway, and a penalty is provided by the statutes of each State for failure to comply with this requirement. It has been held, not only in Kentucky and Missouri, but elsewhere, that, although the railway company, through its servants, may fail to give the statutory signals, yet if a person knows of the approach of a train and is killed at a public highway, his legal representative cannot rely upon the violation of said statute as a right of recovery, either as an insurer or otherwise.

Hutchinson v. Railway Co., 161 Mo. 246;
Murray v. Railway Co., 176 Mo. 189, l. c.;
I. C. Ry. Co. v. Willis' Admr., 97 S. W. 21 (Ky.), and cases cited;
Baltimore, Etc., Ry. Co. v. Abbegglen, 84 N. E. 566 (Ind.);
Pakalinsky v. Railway Co., 82 N. Y. 424.

This Court in

I. C. Ry. Co. v. Willis' Admr., 97 S. W. 21,

quoted with approval from the case of Helm v. Railway Company, 17 Kentucky Law Rep. 1004, as follows:

"The appellant having seen the approaching train, he is not entitled to recover damages from the railroad company for an injury sustained by the train striking him while he was attempting to cross the track in front of the moving train."

The other authorities cited declare the same principle. In other words, although the railway company may be guilty of negligence in failing to give statutory signals which are required for the benefit of the public as well as the employés who are using the crossing, yet, if such negligence is not the proximate cause of the injury complained of, no right of action can be predicated
160 upon the failure of the railway company to comply with such statute.

We cannot understand why this Court, or any other Court, should construe the sixteen-hour law, supra, any more liberally in the way of making the railway company an insurer than the same Courts do their own statutes, which are equally as emphatic in regard to these public duties.

As above suggested, if the sixteen-hour law be construed by the Courts in the same manner as in the opinion promulgated by this Court in the case at bar, then it makes the railway company an insurer for the violation of said law, although said violation is not the proximate cause in any respect of the injury sustained. This idea has been so ably and successfully combated in the recent case of

Ives v. Railway Company, 94 N. E. 431 (N. Y.),

that we urge this Court to read the opinion in that case carefully in considering the motion for rehearing herein.

We readily recognize that there is a natural disposition upon the part of the Courts, in cases of this character, to sympathize with the unfortunate widow and children. But we see nothing in the facts of this case which would warrant the Court in undertaking to deviate from a cool and calm consideration of the statutes relied upon as a basis of recovery in this action.

There is no controversy here about our having selected competent men. The deceased himself, according to the testimony of his widow, had been in our service for thirteen years, and must have been a man of experience. We had our locomotive and all
161 of our equipment in good condition. The crew had ample time and ample opportunity to discharge their duties and get back to Wolf Lake long before they did arrive there. They must have occupied a portion of said time in resting or accomplishing something other than the performance of their duties to the master. If they rested during said time, and were off duty, the above law did not apply.

We have attempted to demonstrate that in a case of this character, where the defendant is charged with having violated the law, it is the duty of the plaintiff to produce affirmative testimony as to such violation before any action can be maintained. We have likewise attempted to show that the provisos contained in Section 3 of said Hours of Service Act relieved the railway company from liability under the evidence disclosed by the record in this case.

And, aside from all this, we have attempted to demonstrate that on the undisputed facts the engineer was guilty of no negligence at the time and place of accident.

The case was submitted to the jury under both the Employers'

Liability Act and the Hours of Service Act, supra. The verdict is a general one, and neither this Court nor anyone else can determine whether the jury found for the railway company on one issue or found against it as to both. If either of said grounds of negligence cannot be legally sustained in this action, then the Court must necessarily reverse the cause, as it cannot be determined which statute the jury followed in its deliberations.

We thank the Court for the courtesy shown us in the oral argument in this case, and as the questions involved therein
162 are new and undetermined, by any other Court, or in any other opinion, we urgently ask that the Court reconsider the case and afford us an opportunity for re-argument upon the propositions heretofore discussed.

Respectfully submitted,

E. T. BULLOCK AND
R. T. RAILEY,
Attorneys for Appellant.

163 Afterwards at a Court of Appeals held at the Capitol at Frankfort on the Second day of January, 1912, the following order was entered, to-wit:

ST. L., IRON MT. & SOUTHERN R. R. CO.
vs.
MC'WHIRTER, Adm'x.

Hickman.

Came the appellee by counsel and filed a response to the petition for rehearing herein.

164 The Response filed by the foregoing order is in words and figures as follows, to-wit:

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Appellant,
vs.
MRS. CORDIE MCWHIRTER, Administratrix of the Estate of Etwal McWhirter, Deceased, Appellee.

Response to Petition for Rehearing.

May it Please the Court:

For response to the petition and motion for a rehearing in this case, and as answer to the printed brief which the appellant has tendered with its petition and motion, we beg to submit that after a careful consideration of each and every proposition set forth in the petition, and each and every argument embodied in the printed brief, we fail to find anything that was not fully discussed in the briefs by the Court in its opinion.

We, therefore, conclude that to further elaborate on the ques-

tions so carefully considered and so ably announced by the Court would be an imposition upon the time and patience of the
165 Court, and we shall decline to make any extended response, or to offer any further authority than that heretofore submitted in our briefs.

The appellant sets forth in its petition and motion "reasons" for which it prays a rehearing in nine numbered paragraphs. These supposed "reasons" are so mixed with conjecture that they do not clearly indicate whether the appellant is merely dissatisfied with the ruling of the Court, or whether it is just an effort to demonstrate that the appellant is unable to understand either the law or the facts in this case,—and accepting either, or both, of these propositions as true, we admit that counsel have sustained them by their petition and brief.

We regard the greater part of this effort to procure a rehearing as merely an effort to inject unsworn testimony into the trial of this case in the Court of Appeals. We have not yet been able to understand that it was the business of this Court to do more than to pass on cases as presented by the record from the lower court; and we hardly think that it is in keeping with the dignity of a Court of last resort to step down from the bench and go to the railroad yards, mount engines, and make practical demonstrations in order to supply evidence, or to determine as to whether or not a fact which was not testified to was true or false. Such in short is the onerous task which the appellant would impose upon the members of this Court.

166 Again we beg to submit that in view of the fact that each and every question presented in the record in this case has been carefully and correctly considered and determined in the original opinion which was filed on November 17th, we feel that to further tax your honors would be an imposition upon your patience, your time and your energies; and we, therefore, earnestly and confidently pray that the appellant's petition and motion may be overruled.

Respectfully submitted,

EATON & BOYD,
Att'ys for Appellee.

Filed Dec. 18, 1911.
NAPIER ADAMS, *C. C. A.*

Afterwards at a Court of Appeals held at the Capitol at Frankfort on the fifth day of January, 1912, the following order was entered, to-wit:

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. CO.
vs.
MCWHIRTER'S ADM'X.

Hickman.

The Court being sufficiently advised, it is ordered that the petition for rehearing in this case be overruled.

Be it remembered that on the 13th day of January, 1912, there was filed in the office of the Clerk of the Court of Appeals an Assignment of Errors, which is in words and figures as follows, to-wit:

167 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

In the Court of Appeals of Kentucky.

No. —.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY (Appellant), Plaintiff in Error,

vs.

Mrs. CORDIE MCWHIRTER, Administratrix of the Estate of Etwal McWhirter, Deceased (Appellee), Defendant in Error.

Assignment of Errors by Plaintiff in Error.

Now comes the St. Louis, Iron Mountain and Southern Railway Company, Appellant in the Court of Appeals of Kentucky, and Plaintiff in Error in a writ of error to the Court of Appeals of Kentucky from the Supreme Court of the United States, duly allowed, in the above entitled cause of Mrs. Cordie McWhirter, Administratrix of the Estate of Etwal McWhirter, Deceased, Appellee and Defendant in Error, against the St. Louis, Iron Mountain and Southern Railway Company, Appellant in said Court of Appeals of Kentucky, and Plaintiff in Error in said writ of error in the Supreme Court of the United States in said cause, and upon
168 a judgment in the Court of Appeals of Kentucky, at the September Term thereof, A. D. 1911, and on the 17th day of November, 1911, in the above entitled cause, the said St. Louis, Iron Mountain and Southern Railway Company, Defendant and Appellant in the Court of Appeals of Kentucky, and Plaintiff in Error in said writ of error returnable into the Supreme Court of the United States, according to law, does say, by its attorneys and counsel in this behalf, that: In the record and proceedings in said cause there is manifest error to its prejudice upon the merits of said cause, and they assign error in said record and proceedings *to* this, to-wit:

I. The said Court of Appeals of Kentucky erred in its construction of the Federal Employers' Liability Act of 1908, in holding that plaintiff's petition, including the amendment thereto, contained facts sufficient to authorize a recovery in favor of said defendant in error, based upon the alleged negligence of the conductor and engineer at the time and place of accident, as said petition and amendment in respect to the matters aforesaid simply plead legal conclusions, without any issue of fact being tendered or pleaded therein.

II. That the said Court of Appeals erred, as shown by the undisputed facts in the record, in holding that there was any legal evi-

dence offered at the trial either proving, or tending to prove, that said defendant's conductor and engineer, or either of them, were guilty of any negligence whatever at the time deceased was killed.

III. That said Court of Appeals erred in sustaining the
169 trial court as to the legality of plaintiff's instruction "C" given at her instance, as follows:

"The Court instructs the jury that if you shall believe from the evidence that the train, on which the decedent, Etwal McWhirter, was employed at the time of the accident which caused his death, was engaged or employed in interstate commerce, and if you shall further believe from the evidence that the death of the said Etwal McWhirter resulted from the negligence and wrongful acts of the conductor, engineer, or servants of the defendant superior in authority to the said Etwal McWhirter, you will find for the plaintiff such damages as you may believe from the evidence that she has sustained, not to exceed, however, the sum of $25,000.00."

Said instruction is erroneous, because the petition fails to state a cause of action, because there is no legal evidence shown in respect to the alleged negligence of defendant's servants at the time and place of accident, and because the jury were given a roving commission by said instruction to convict defendant of a violation of some supposed duty not pleaded, and without the jury being required to find such facts, if they existed, as would have rendered defendant liable under either Act of Congress pleaded in petition, or under any other statute or law.

IV. That the Court of Appeals of Kentucky, as shown by its opinion, erred in construing the Federal Liability Act of
170 1908, (35 U. S. Stat. at Large, 65, Chap. 149), as applicable to the facts and pleadings disclosed by the record in this cause, or as affording any basis of recovery in behalf of defendant in error.

V. That said Court of Appeals erred in construing said Federal Employers' Liability Act of 1908, so as to make plaintiff in error an Insurer of deceased, as against the alleged personal negligence of the engineer at the time and place of accident.

VI. That said Court of Appeals erred in holding that plaintiff in error, under the pleadings and on the facts disclosed by the record, was an Insurer as to the safety of deceased either under said Employers' Liability Act of 1908, or under said Federal Hours of Service Act, (34 U. S. Stat. at Large, 1415, 1416, Chap. 2939), or under both combined.

VII. That said Court of Appeals erred in holding, as shown by its opinion and the record, that plaintiff in error was an insurer as to the safety of deceased, under either of the acts aforesaid or under any other statute or law upon the subject.

VIII. That said Court of Appeals erred in holding that there was any legal evidence shown at the trial with reference to the conduct of the engineer at the time and place of accident, which operated as a proximate cause of the death of plaintiff's said husband.

IX. That said Court of Appeals erred in holding that the
171 contributory negligence of deceased and his assumption of risk at the time and place of accident were not available to

defendant as a defense, on account of the risks assumed by deceased, nor by way of diminution of damages on account of his contributory negligence.

X. That said Court of Appeals erred in refusing to hold that, on the undisputed facts disclosed by the record, the deceased lost his life by reason of his own voluntary acts, without any reference to the alleged wrongful and negligent acts of defendant or its servants.

XI. That said Court of Appeals erred in holding that plaintiff was entitled to recover by reason of the alleged violation of the Hours of Service Act by defendant, although deceased himself was assisting in its alleged violation at the time and place of accident, if said statute was violated as alleged.

XII. That said Court of Appeals erred in holding that plaintiff in error was an insurer as to the safety of deceased under the Federal Hours of Service Act, (34 U. S. Stat. at Large, 1415, 1416, Chap. 2939), and especially erred in holding that the alleged violation of said act made defendant an insurer, although there was no causal connection between said alleged violation and the death of deceased.

XIII. That said Court of Appeals erred in holding that the alleged violation of said sixteen-hour law was negligence per se, and made defendant liable as an insurer, although said alleged negligence was not the proximate cause of the death of deceased.

172 XIV. That said Court of Appeals erred in holding that plaintiff's instruction "I" correctly declared the law, for the same reasons set out in the preceding paragraphs XII and XIII of this assignment, which said instruction reads as follows:

"The Court further instructs the jury that if you shall believe from the evidence that the said Etwal McWhirter had been permitted or required to be or remain on duty continuously for more than sixteen consecutive hours next before the accident which caused his death, then the defendant was negligent and liable in damages for said injury and death of Etwal McWhirter, if you shall believe from the evidence that the permitting or requiring the said Etwal McWhirter to be or remain on duty continuously for more than sixteen consecutive hours next before his death in any way contributed to the said accident and death, you will find for the plaintiff such damages as you may believe from the evidence she has sustained by reason of his death, not to exceed the sum of $25,000."

XV. That the said Court of Appeals erred in holding that the alleged violation of said sixteen-hour law conferred upon plaintiff a right of action for damages, or that a right of action survived to plaintiff under said act as the legal representative of her said husband.

XVI. That the Court of Appeals of Kentucky, as well as

173 the Circuit Court, erred in holding that there was sufficient evidence, or any evidence, adduced at the trial to show that deceased had been on duty for a longer period than sixteen consecutive hours immediately preceding his death, or that he had been actually on duty any substantial portion of the time between 3:30

P. M. on February 22, 1910, when he left Illmo, Missouri, for Bush, Illinois, with nine empty cars for coal, and 7:35 the following morning, when he was killed at Wolf Lake, Illinois.

XVII. That said Court of Appeals and said Circuit Court erred in holding that the Hours of Service Act, supra, applied to the case at bar, as the undisputed facts in the record show that deceased left Bush at 12:30 or 1:00 o'clock on the morning of February 23, 1910, for Wolf Lake, and that the distance between said points, as shown by the record, is only thirty-five miles; that defendant, appellant in the said Court of Appeals, was not bound to anticipate that its servants, with all the machinery and appliances in good shape, as shown by the record, could not safely reach Wolf Lake in six hours and thirty minutes, when the distance was only thirty-five miles; and that by reason of the foregoing, said act does not apply, as shown by the provisos of Section Three of same.

XVIII. That said Court of Appeals erred in holding that the provisos mentioned in Section Three of the Hours of Service Act do not apply to the case at bar, because the answer of appellant did not plead same, although the facts relating thereto were intro-
174 duced in evidence by plaintiff as part of her case in chief, without objection, and hence should be considered by the court, although said answer does plead that the death of deceased was due to an unavoidable accident.

XIX. That said Court of Appeals erred in overruling appellant's motion for a rehearing filed in said court, and likewise erred in refusing to reverse said cause without remanding and in entering judgment for appellant on account of the matters aforesaid and on the undisputed facts disclosed by the record.

XX. That said Court of Appeals erred in holding that any right of action survived under either the Employers' Liability Act of 1908, or the Amendment thereto passed in 1910, as the latter did not become effective until April, 1910, while deceased was killed on February 23, 1910.

XXI. That said Court of Appeals erred in holding that the Amendment to the Employers' Liability Act of 1908, passed by Congress in 1910, was retroactive in its operation, and authorized said Circuit Court to try said cause under either or both of the acts pleaded and relied on in her petition as a basis of recovery.

XXII. That the Court of Appeals of Kentucky erred in its construction of the Hours of Service Act, supra, as shown by its opinion, as follows:

"In thus requiring of the intestate more than sixteen con-
175 secutive hours of service, albeit the excess of service over the sixteen hours was but five or seven minutes, appellant violated the statute, supra; and as the death of the intestate, from the act of its engineer complained of, occurred while he was engaged in the required continuous service and after the expiration of the sixteen consecutive hours allowed by the statute, there seems to be no escape from the conclusion that the act of appellant in thus extending his service beyond the statutory limit was negligence per se, to which

the intestate's death must as a matter of law be attributed, and if so, the right of appellee to maintain this action cannot be questioned."

For the foregoing prejudicial errors, and each of them, affecting the merits of this cause, appellant, (plaintiff in error) prays a reversal of the judgment of the said Circuit Court of Hickman County, Kentucky, and the judgment of affirmance thereof by the Court of Appeals of Kentucky.

And the said St. Louis, Iron Mountain and Southern Railway Company, as plaintiff in error, prays that the judgment aforesaid, for each of the errors aforesaid and for other errors in the record and proceedings in said cause, whereby the said plaintiff in error has been by said judgment deprived of its rights, privileges and immunities, and for each of the errors and matters above assigned, be reversed, annulled and held for naught; and that the said
176 plaintiff in error may be restored to all things which it has lost by reason of said judgment of the said Court of Appeals of Kentucky and by the judgment of the said Circuit Court of Hickman County, Kentucky, affirmed thereby.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,
By E. T. BULLOCK AND
R. T. RAILEY,
Its Attorneys of Record.

Filed Jan. 13, 1912.

ROBT. L. GREENE, *C. C. A.*

And on the same date there was filed in the office of the Clerk of the Court of Appeals a petition for a Writ of Error and which is attached hereto and is as follows:

177 In the Court of Appeals of Kentucky.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant,
vs.
Mrs. CORDIE MCWHIRTER, Administratrix of the Estate of Etwal McWhirter, Deceased, Appellee.

To the Honorable the Judges of the Supreme Court of the United States, or to any of the Associate Judges thereof, or to the Chief Justice of the Court of Appeals of Kentucky:

Now comes the above named defendant, appellant in the Court of Appeals of Kentucky, by its attorneys, and complains:

That in the record and proceedings had in said cause of St. Louis, Iron Mountain and Southern Railway Company, Appellant, vs. Mrs. Cordie McWhirter, Administratrix of the Estate of Etwal McWhirter, Deceased, Appellee, No. —, in the Court of Appeals of Kentucky, and also in the rendition of the judgment in the

above-entitled cause in the Circuit Court of Hickman County, in the State of Kentucky, as shown by the record in said cause, manifest error has happened, to the great damage of the said St. Louis, Iron Mountain and Southern Railway Company, the defendant therein, and appellant in the Court of Appeals of Kentucky; that said error in the judgments of each and both of said State courts consisted in the denial of rights and immunities expressly claimed by said defendant, (appellant), under the Federal Employers' Liability Act of 1908, (35 U. S. Statutes at Large, p. 65, chapter 149), and under the Federal Hours of Service Act, (34 U. S. Statutes at Large, pp. 1415, 1416, chapter 2939), and in the affirmance of alleged rights and immunities claimed by plaintiff, (appellee), under each
178 of the foregoing Acts, which said alleged rights and immunities were controverted by said defendant, (appellant); that under and by virtue of the records and proceedings in the State courts aforesaid, the proper construction of each of said Federal Acts was involved, and the right of plaintiff (appellee) to recover in said cause was based solely upon the two Federal Acts aforesaid; that the judgments of said State courts were based solely upon the Federal Acts aforesaid, and each of said Acts was erroneously construed by each of said State courts adversely to the contention of defendant, (appellant); and that the said Court of Appeals of Kentucky, in whose record and judgment the aforesaid errors appear, is the highest court of law or equity in the State of Kentucky in which a decision could be had in said suit between the parties thereto aforesaid.

Wherefore, said defendant, (appellant), by its attorneys, prays for the allowance of a writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky, and for an order fixing the amount of bond for supersedeas in said cause, and for such other orders and proceedings as may cause the manifest errors in said cause to be corrected by the said Supreme Court of the United States of America.

Dated this 13th day of January 1912.

E. T. BULLLOCK AND
R. T. RAILEY,
Attorneys for said Defendant (Appellant).

179 And on said date there was filed in the office of the Clerk of the Court of Appeals a Writ of Error from the Supreme Court of United States and the order allowing same by the Chief Justice of the Court of Appeals, and which is attached hereto is as follows, to-wit:

180 In the Supreme Court of the United States.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY (Appellant), Plaintiff in Error,

vs.

MRS. CORDIE MCWHIRTER, Administratrix of the Estate of Etwal McWhirter, Deceased (Appellee), Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA,
Eastern District of Kentucky,
Sixth Judicial District:

The President of the United States to the Honorable the Judges of the Court of Appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of Kentucky, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between the St. Louis, Iron Mountain and Southern Railway Company, Appellant, and Mrs. Cordie McWhirter, Administratrix of the Estate of Etwal McWhirter, Deceased, Appellee, wherein was drawn in question the construction of two statutes of the United States, namely, the Employers' Liability Act of 1908, (35 U. S. Statutes at Large, p. 65, Chapter 149), and the Federal Hours of Service Act, (34 U. S. Statutes at Large, pp. 1415, 1416, Chapter 2939), as applicable to and bearing upon the assessment of damages against the said St. Louis, Iron Mountain and Southern Railway Company for injuries occurring to Etwal McWhirter, which resulted in his death at Wolf Lake, Illinois, on the 23d day of Feb-
181 ruary, 1910, and the decision was against the right, privilege, or exemptions specifically set up or claimed by Plaintiff in Error under the statutes aforesaid, a manifest error hath happened to the great damage of the said St. Louis, Iron Mountain and Southern Railway Company, the plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington, in the District of Columbia, thirty days after the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this the 13th day of January,

in the year of our Lord 1912, and of the Independence of the United States of America, the one hundred and thirty-sixth.

[Seal Eastern K't'y Dist. Court, United States of America.]

JOHN W. MENZIES,
Clerk of the District Court of the United States for the Eastern District of Kentucky, at Frankfort,
By CHAS. N. WIARD, *D. C.*

Allowed January 13th, 1912, by
J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

182 In the Court of Appeals of Kentucky.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant,
vs.
Mrs. CORDIE MCWHIRTER, Administratrix of the Estate of Etwal McWhirter, Appellee.

Order on Petition for Writ of Error.

Now, on this 13th day of January, 1912, there is presented to the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky, in Chambers, a petition for a writ of error to the Supreme Court of the United States, a writ of error to the Supreme Court of the United States, a citation directed to said Appellee, citing and admonishing her to appear in the Supreme Court of the United States not exceeding thirty days from and after the day said citation bears date, and an assignment of errors; which said petition for a writ of error is allowed, which said writ of error is allowed, said citation signed, said assignment of errors filed, and an order of said Chief Justice filed approving the writ of error bond in the sum of Five Thousand Dollars ($5,000.00), which said bond is also filed and which is to operate as a supersedeas.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

183 And on said date there was filed in the office of the Clerk of the Court of Appeals a Writ of Error Bond, and which is in words and figures as follows, to-wit:

In the Court of Appeals of Kentucky.

Mrs. CORDIE MCWHIRTER, Administratrix of the Estate of Etwal McWhirter, Deceased (Plaintiff), Appellee,
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY (Defendant), Appellant.

Writ of Error Bond.

Know all men by these presents: That we, the St. Louis, Iron Mountain and Southern Railway Company, as principal, and the

United States Fidelity and Guaranty Company of Baltimore, Md., as surety, are held and firmly bound unto Mrs. Cordie McWhirter, Administratrix of the Estate of Etwal McWhirter, Deceased, in the full and just sum of Five Thousand Dollars ($5,000.00), to be paid to the said Mrs. Cordie McWhirter, as administratrix aforesaid, to which payment, well and truly to be made, we bind our-
184 selves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 12th day of January, 1912.

Whereas, lately, at the September Term, 1911, of the Court of Appeals of Kentucky, and on the 17th day of November, 1911, in a suit pending in said Court, between said Mrs. Cordie McWhirter, Administratrix of the Estate of Etwal McWhirter, Deceased, (Appellee), Plaintiff, and the said St. Louis, Iron Mountain and Southern Railway Company, (Appellant), Defendant, judgment was rendered against the said defendant, and said appellant having obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and the citation directed to the said Mrs. Cordie McWhirter, Administratrix of the Estate of Etwal McWhirter, Deceased, Appellee and Plaintiff, citing and admonishing her to be and appear in the Supreme Court of the United States, to be held at Washington, D. C., not exceeding thirty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said St. Louis, Iron Mountain and Southern Railway Company, Appellant, (as Plaintiff in Error), shall prosecute said writ to effect, and answer all damages and costs, if it fails to make good its said plea, then the above obligation to be void; else to remain in full force and virtue.

185 ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
By B. F. BUSH, *Its President.* [SEAL.]

Attest:
[SEAL.] F. W. IRLAND, *Ass't Sec'y.*

UNITED STATES FIDELITY AND GUAR-
[SEAL.] ANTY COMPANY OF BALTIMORE, MD.,
By HALMHUBER & SKILES, [SEAL.]
Its Agents,
By GEO. HALMHUBER.

Sealed and delivered in the presence of
——— ———.

Approved this 13th January, 1912.
J. P. HOBSON,
Chief Justice Kentucky Court of Appeals.

Filed Jan. 13, 1912
ROB'T L. GREENE, *C. C. A.*

And on the same date there was filed in the office of the Clerk of the Court of Appeals the Original Citation, with acceptance of service thereof, and which is hereto attached as follows:

186 In the Court of Appeals of Kentucky.

No. —.

Mrs. CORDIE MCWHIRTER, Administratrix of the Estate of Etwal McWhirter, Deceased (Plaintiff), Appellee,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY (Defendant), Appellant.

Citation.

The United States of America to Mrs. Cordie McWhirter, administratrix of the estate of Etwal McWhirter, deceased, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the Court of Appeals of Kentucky, wherein the St. Louis, Iron Mountain and Southern Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky, this 13th day of January, 1912.

J. P. HOBSON,
Chief Justice.

We hereby acknowledge due service of the foregoing Citation, this 13th day of January 1912.

EATON & BOYD,
Attorneys for Defendant in Error.

187 COMMONWEALTH OF KENTUCKY,
The Court of Appeals, sct:

In obedience to the commands of the attached Writ of Error I hereby transmit to the Supreme Court of the United States, the complete transcript of the entire record with all things touching same as appears from the records and files of my office in the case of St. Louis, Iron Mountain & Southern Railway Company, Appellant and plaintiff in error, vs. Etwal McWhirter's Adm'r, deceased, apppellee and defendant in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office.

Done at the Capitol at Frankfort, Ky, on this the 22nd day of January, A. D. 1912.

[Seal Kentucky Court of Appeals.]

ROBERT L. GREENE,
Clerk of the Court of Appeals.

Fee for this Transcript $65.25.

Endorsed on cover: File No. 23,046. Kentucky Court of Appeals. Term No. 970. The St. Louis, Iron Mountain and Southern Railway Company, plaintiff in error, vs. Mrs. Cordie McWhirter, administratrix of the estate of Etwal McWhirter, deceased. Filed February 6th, 1912. File No. 23,046.

Office Supreme Court, U. S.
FILED.
JUN 3 1912
JAMES H. McKENNEY,
CLERK.

(23046)

The Supreme Court of the United States

October Term, 1911

No. 541

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY — Plaintiff in Error

VS.

MRS. CORDIE McWHIRTER, Administratrix of the Estate of Etwal McWhirter, Deceased — Defendant in Error

In Error to the Court of Appeals of the State of Kentucky

Motion by Defendant in Error to Dismiss Writ of Error and Appeal

EATON & BOYD,
Attorneys for Defendant in error.

And now comes the defendant in error and moves the Court to dismiss the writ of error and the appeal herein for the following reasons, viz:

FIRST: The petition and amended petition stated a good cause of action, both at the Common Law and under the Federal Employers' Liability Act of 1908. There was evidence to support each of these causes and this was so decided by the Kentucky Court of Appeals; and the defendant in error having rested her case upon both the Federal and non-federal causes, this Court is without jurisdiction and the writ of error should be dismissed.

SECOND: The plaintiff in error admits by both its pleadings and evidence that McWhirter was killed by its train while he was going out in front of the engine to throw the switch, "as it was his duty to do," and while in the performance of his duty. And the defendant (plaintiff in error) having admitted that McWhirter was killed while in the performance of his duty and while going out in front of the engine to throw a switch, as it was his duty to do, and the engineer having admitted that he knew of the presence of McWhirter in front of the engine and that he maintained no lookout for him, this constituted evidence of negligence and it was properly submitted to the Jury; and for that reason the appeal should be dismissed.

THIRD: Neither this Court nor the Court of Appeals of Kentucky was authorized by the pleadings to consider the contributory negligence, if any, of McWhirter, because the plaintiff in error did not plead contributory negligence in any form; and furthermore, both contributory negligence and assumption of risk as defenses are barred by the Federal Employers' Liability Act of 1908. And this Court is also without jurisdiction to consider whether the negligence of the engineer was the proximate cause of the death of McWhirter, because the Lower Court decided that the negligence of the engi-

neer and the violation of the Hours of Service Act concurred in causing the accident and injury complained of.

FOURTH: This Court cannot consider the failure of the State Court to remove this case to the Federal Court because the plaintiff in error did not present a transcript of the record in the United States Circuit Court for the Western District of Kentucky, nor did it except to the ruling of the State Court in overruling its petition and motion to transfer; and furthermore, by the Act of April 5, 1910, entitled "An Act to amend an act entitled An Act Relating to the Liability of Common Carriers by Railroad to Their Employes in Certain Cases Approved April 22nd, 1908," it is provided that "no case arising under this act and brought in any State Court of competent jurisdiction shall be removed to any Court of the United States."

James Denis Moquot,
of Counsel.

I

THE PETITION AND AMENDED PETITION STATED A GOOD CAUSE OF ACTION, BOTH AT THE COMMON LAW AND UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT OF 1908. THERE WAS EVIDENCE TO SUPPORT EACH OF THESE CAUSES AND THIS WAS SO DECIDED BY THE KENTUCKY COURT OF APPEALS; AND THE DEFENDANT IN ERROR HAVING RESTED HER CASE UPON BOTH THE FEDERAL AND NON-FEDERAL CAUSES, THIS COURT IS WITHOUT JURISDICTION AND THE WRIT OF ERROR SHOULD BE DISMISSED.

Omitting the formal parts, the original petition in this case is as follows:

> "Plaintiff now says that at the time of the death of the said Etwal McWhirter, deceased, he was employed by and in the service of the St. Louis, Iron Mountain & Southern Railroad Company, defendant herein, in the capacity of Flagman, that the death of the said Etwal McWhirter resulted from the wrongful acts of the Conductor and Engineer in charge of the train and locomotive on which the said Etwal McWhirter, deceased, was at the time of his death employed and acting as Flagman, as aforesaid, and by the negligence and wrongful acts of the train dispatcher, and higher officials, who had control and authority over this plaintiff's intestate, of the defendant, St. Louis, Iron Mountain & Southern Railroad Company; that the said Etwal McWhirter was killed while so acting as Flagman, and at a time he was employed by the St. Louis, Iron Mountain and Southern Railroad Company by being run over and crushed and mangled by the train and locomotive of the said defendant herein; that at the time of the said accidental death of the aforesaid Etwal McWhirter, the train and locomotive on which he was so employed and on which he was acting in the capacity of the flagman for the defendant herein, was engaged in the transportation of freight between the States of Missouri and Illinois, and that the sai dtrain and locomotive aforesaid was an in-

terstate train and was engaged in interstate commerce between the aforesaid States of Missouri and Illinois.

"Plaintiff further says that her cause of action herein arose against the defendant by reason of the wrongful and negligent death of her aforesaid husband, Etwal McWhirter, which was occasioned by the negligent and wrongful acts of the officers and agents of the defendant as aforesaid, in managing and operating its train, while her husband was employed by the defendant, St. Louis, Iron Mountain and Southern Railroad Company, as flagman on a train and locomotive engaged, in interstate commerce as aforesaid; that her said husband had been permitted and required by the officers and agents of the defendant to be and remain on duty for a longer period than sixteen consecutive hours next before the aforrsaid accident, and in violation of Chapter 29-39, Section 2, 34 Statute 1416, of the Acts of Congress of the United States relating to interstate commerce, and being a part of an act entitled "An Act to Promote the Safety of Employes and Travelers upon Railroads by limiting the hours of service —of Employes Thereon," which became a law on the 4th day of March, 1907. and also an act entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employes in Certain Cases", which became a law on the22nd day of April, 1908; and that the aforsaid negligent and wrongful acts of the officers and agents of the said defendant, and the said violation of the laws of the United States relating to the interstate commerce were the proximate and sole causes of the death of her said husband, and she relies on the laws of the United States made and provided in such cases.

"Plaintiff now says that the said Etwal McWhirter, deceased, was a young and able bodied man aged thirty-four years, and that his expetancy of life was, at the time of his death, more than twenty-eight years; that he was capable of earning $100.00 per month, and that at the time of his death he was capable of, and was earning a living for this plaintiff and his aforesaid infant children, and was their sole and only support and that by reason of the wrongful and negligent acts of the defendant, and its officers and agents, and the aforesaid viola-

tion of law, as set out above, which acts and violations of law resulted in the death of the said Etwal McWhirter, she has been damaged in the sum of $25.000.00 and is now entitled to recover of the defendant the aforesaid sum of $25.000.00.

"Wherefore, plaintiff prays for a judgment against the defendant for the sum of $25.00.00, for her cost herein expended, and for all proper orders and relief." (Pages 2 and 3 of the Printed Record.)

The plaintiff's amended petition is as follows:

"Now comes the plaintiff and begs leave of the Court to file this her amended petition, and for cause says that by mistake and oversight it was alleged that the death of her husband, Etwal McWhirter was occasioned by the wrongful acts of the conductor and engineer in charge of the train on which her said deceased was employed at the time of his death; but she now says that said death was occasioned by the wrongful and negligent acts of the said conductor and engineer in charge of the train and locomotive on which the said Etwal McWhirter, deceased, was employed at the time of his death, and as alleged in the original petition.

"Wherefore, she prays as in her original petition." (Page 9 of the Printed Record.)

By these pleadings it is definitely stated that the deceased, McWhirter, was employed by plaintiff in error as flagman on its train; that it was engaged as a carrier in Interstate Commerce, and that it was so engaged and the deceased was so employed by it at the time of the accident which produced his death; that the deceased had been required and premitted by said carrier to be and remain on duty for a longer period than sixteen consecutive hours next before the accident which caused his death; and all in violation of the provisions of an Act of Congress entitled "An Act To Promote The Safety Of Employes And Travelers Upon Railroads By Limiting The Hours Of Service Of Employes Thereon," which became a law on the 4th day of March, 1907.

This being an Act To Promote the Safety Of Employes, the violation of it by the plaintiff in error, which resulted in the injury complained of as alleged, gave a right of action under the Act of Congress entitled, "An Act Relating To The Liability Of Common Carriers By Railroad To Their Employes In Certain Cases" which became a law on the 22nd day of April, 1908.

No question is raised but that these Acts are correctly pleaded under the Code of Kentucky. And under our form of pleading, the accident and injury resulting therefrom was sufficiently and correctly stated in the petition and amended petition. And furthermore the plaintiff in error never at any time demurred to the petition or amended petition of made any motion to require the same to be made more specific.

The plaintiff below having stated a cause of action both at Common Law and under the Federal Statutes and there being evidence to support both causes, this Court is without jurisdiction to entertain this writ of error and appeal.

In Eustis vs. Bolles, 150, U. S. 362, this Court says, "It is likewise settled law that, where the record discloses that if a question has been raised and decided adversly to a party claiming the benefit of a provision of the Constitution or Laws of the United States, another question, not Federal, has been raised and decided against such party, and the decision of the latter question is sufficient, not withstanding the Federal question, to sustain the judgment, this Court will not review a judgment."

In the case of Rutland Railroad Co.. vs. Central Vermont Railroad Co., 159 U. S. 630, this Court says, (Pages 640-1) "It is well settled, by a long series of decisions of this Court, that where the highest Court of a State, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground not involved in a Federal question, and broad enough to support the judgment, the writ of ororo will be dismissed without considering the Federal question."

In the case of Giles vs. Teasley, 193 U. S. 147 (Page 160) the Court says, "It is equally well settled that if the decision of a state Court rests on an independant ground on which does not necessarily include a determination of the Federal right claimed or upon a ground broad enough to sustain it without deciding the Federal question raised, this Court has no jurisdiction to review the judgment of the state court."

In the case at bar, not only did the plaintiff's petition state a cause of action at Common Law, but the Court of Appeals of Kentucky in considering this case expressly holds that there was sufficient evidence to sustain a finding for the plaintiff under that breach of the case.

The Court of Appeals of Kentucky says:

"We also find from the averments of the petition as amended that appellee asserts the right to recover of appellant the damages claimed on the ground that the death of her intestate was also attributable to the negligence of the conductor and engineer in charge of the train. The record fails to show any negligence on the part of the conductor, other than his act in continuing the train crew on duty longer than sixteen consecutive hours, but there was some evidence tending to show negligence on the part of the engineer, from which the jury had the right to determine whether it was a concurring cause of the intestate's death.

"It appears from the testimony of the engineer himself that the intestate's death occured under the following circumstances; when the train reached Wolf Lake, the intestate, whose place as flagman was at the front end of the train, was notified by the engineer that it would stop over at the place on account of the sixteen-hour law. The intestate was then in the cab of the engine and he at once stepped out of the engine and along the foot board from which he got to the ground ahead of the engine for the purpose of throwing a switch that the train might be side-tracked. Although in view of the engineer all of the time, the latter admitted that he did not look to see where he was or what he did. Very soon after the intestate left the engine, the engineer observed the Wolf Lake telegraph operator excitedly signaling him to stop the train which was then moving at the rate of three or four miles an hour. The engineer immediately stopped the train and upon stepping off of the engine was told by the operator he had run over the intestate, whose body was found under the tank wheel, cut in two."

"In reply to the direct question, "How was he killed?" the engineer said, "Performing his duty; going out to set a switch."

"According to the testimony of the operator Loper, (Robinson) who seemed to be the only eyewitness to the accident, the intestate left the engine as described by the engineer and ran toward the switch but fell between the rails before reaching it. He then got upon his hands and knees, but before getting to his feet was run over by the engine. When

he fell the operator began signalling the engineer to stop the train, but the latter failed to observe the signals in time to stop the engine before it ran over the intestate.

"There was no proof that the manner in which the intestate approached the switch was not the usual and an ordinary safe way of doing so and of setting the switch; and as he was in plain view of the engineer from the time he left the engine, or would have been if the engineer had maintained a lookout in that direction, the latter knowing that he was going in front of the engine, should have kept such lookout for his movements; had he done so, there was nothing to prevent his seeing him fall, and with the train going at only three or four miles an hour the reversal of the engine and application of the air brakes might, and in all probability would have stopped the train in time to enable the intestate to regain his feet and make his escape.

"If appellee's right of recovery had depended alone upon her ability to show her intestate's death was caused by the negligence of the engineer there was, as we have seen, evidence conducing to prove such negligence."

"IT IS HOWEVER, PROPER TO SAY THAT THE NEGLIGENCE OF APPELLANT'S ENGINEER IN THE PARTICULAR MENTIONED AND THAT OF ITS CONDUCTOR, OR SOME OTHER SERVANT IN CONTROL OF ITS TRANSPORTATION DEPARTMENT, IN KEEPING APPELLEE'S INTESTATE ON DUTY AS A BRAKEMAN FOR A LONGER PERIOD THAN SIXTEEN CONSECUTIVE HOURS, CONCURRED IN CAUSING HIS DEATH, AND ALL BEING SERVANTS OF APPELLANT THEIR NEGLIGENCE IS CHARGEABLE TO IT.. Therefore the question of proximate cause raised by counsel for appellant can have no part in our consideration of the case." (Pages 43-44 of the Printed Record.)

II

THE PLAINTIFF IN ERROR ADMITS BY BOTH ITS PLEADINGS AND EVIDENCE THAT THE DECEASED WAS KILLED BY ITS TRAIN WHILE HE WAS GOING OUT IN FRONT OF THE ENGINE TO THROW THE SWITCH, "AS IT WAS HIS DUTY TO DO", AND WHILE IN THE PERFORMANCE OF HIS DUTY. AND THE DEFENDANT (PLAINTIFF IN ERROR) HAVING ADMITTED THAT McWHIRTER WAS KILLED WHILE IN PERFORMANCE OF HIS DUTY AND WHILE GOING OUT IN FRONT OF THE ENGINE TO THROW A SWITCH AS IT WAS HIS DUTY TO DO, AND THE ENGINEER HAVING ADMITTED THAT HE KNEW OF THE PRESENCE OF McWHIRTER IN FRONT OF THE ENGINE AND THAT HE MAINTAINED NO LOOKOUT FOR HIM, THIS CONSTITUTED EVIDENCE OF NEGLIGENCE AND IT WAS PROPERLY SUBMITTED TO THE JURY; AND FOR THAT REASON THE APPEAL SHOULD BE DISMISSED.

From the Defendant's answer we quote as follows:

> "The defendant further answering says: Etwal McWhirter was killed February 23, 1910, at 7:25 A. M. at Wolf Lake, Illinois; that he was a flagman on a freight train which was going in at Wolf Lake, a station on defendant's road, to tie up, with Conductor Coper in charge on an Extra 503 going south; that while going in on a siding at Wolf Lake, Illinois, Etwal McWhirter, while acting as flagman, went out on a running board on the left side of the engine; went down on the pilot and on to the ground to run ahead to throw the switch as it was his duty to do to head in at Wolf Lake; and while running or starting to run, he stumbled or slipped and fell just in front of the engine, and the engine passed over him killing him at the time. That the killing was an accident and was unavoidable." (Pages 7 and 8 of the Printed Record.)

Thus it will be seen that the answer of the plaintiff in error in no way presents contributory negligence, as a defense but undertakes to avoid the Sixteen Hour Law by fixing the time of the accident at 7:25 A. M., on the morning of February 23rd. The facts stated in this

answer are sufficient evidence of negligence to warrant a submission of this case to the Jury. Having admitted that McWhirter was run over by its engine, the plaintiff in error failed to state any facts which would relieve it from liability on account of the death of McWhirter, but by the very terms of its pleadings, it placed McWhirter in front of this engine and says that it was his duty to be there and yet it does not make and pretense of having taken any precaution for his safety but merely seeks to avoid liability by the bare statement "that the killing was an accident and unavoidable." The evidence of its only witness (Mr. Roper)) fixes the time of the accident at 7:37 A. M. which was seven minutes over the Sixteen Hour Law. On this point the evidence is as follows:

"Q. What were you going into Wolf Lake for, what was the occasion for going in there?"

"A. On account of the Sixteen hour law?"

(Page 37 of the Printed Record.)

"Q. Do you know about the time that that train arrived at Wolf Lake Station?"

"A. At seven thirty-seven (7:37) A. M.

(Page 38 of the Printed Record.)

It is also shown by witness H. O. Guess, that McWhirter had been on duty from 3:30 P. M. on the 22nd day of February, that this accident occured at 7:35 or 7:37 A. M. on February 23rd, and the evidence of said witness shows that the engineer, although he knew that McWhirter was in front of the moving train, yet failed to keep any lookout for him or to notice what happened to him. We quote from his evidence as follows:

'Q. What time were you called out from Elmo (Ilmo) on the 22nd of February last?"

(Page 19 of the Printed Record.)

"A. At 3:30 as well as I remember."

"Q. How was he (McWhirter) killed?"

"A. Performing his duty, going out to get a switch."

"Q. Just detail the manner as is occured, as you know it."

"A. As I came into Wolf Lake, when I whistled for town brakeman ask me if I were going to head in at Wolf Lake. I told him yes, that we had to get in on account of the sixteen hour law. He got up, went out of the window on the left hand side of the engine along the foot board, and the next thing I

seen was the operator at Wolf Lake very much excited in giving a stop signal. I stepped off the engine, asked him what was the matter. He said, "My Godness, you have run over the brakeman." I went looking for him, found him under the left tank wheel cut in two."

"Q. 22 The brakeman referred to was whom?"

"A. McWhirter."

'Q. 23 How was your train known. By what name?"

"Extra South 503."

"Q. 26 What did you supose he went out of the cab window for?"

"A. He is supposed to get out there to open the switch. I suppose that is what he went out there for.

"Q. 33 You stated before the coroner's inquest "at 7:30 the sixteen hour law was up. We were seven minutes over time." Was that correct?

"A. I suppose so. As near as I can remember it was five minutes. It was seven thirty-five. If I said 7:37 that was correct. Then I knew it. It has been over a year ago now.

(Pages 20 and 21 of the Printed Record.)

We also call attention to the fact that Mr. Roper, the Conductor, testified on cross examination that there was nothing the matter with the train and he also says that it was the duty of the brakeman to go ahead of the train and throw the switch. His evidence in part follows:

"Q. 5 You never knew or heard of anything wrong with your train at all?"

"A. No sir."

'Q. 6 Say whether or not it is the duty of the brakeman to go ahead of the train and throw the switch as at Wolf Lake, to let the train in—if that is part of his duty?"

"A. It is his duty to throw the switch."

"Q. 7 To throw the switch?"

"A. Yes sir."

(Page 27 of the Printed Record.)

The same witness introduced by the plaintiff in error, testified as follows:

"Q. When you got to this place, Wolf Lake, did your crew proceed on, or were you relieved?"

"A. Were relieved."

"Q. Was that the end of your run?"

"A. It is on account of the sixteen hour law."

"Q. Do you know about the time that train arrived at Wolf Lake Station?"

"A. At seven thirty-seven (7:37) A. M.

"Q. Where is Ilmo?"

"A. In Missouri."

"Q. Where is Bush?"

"A. In Illinois."

(Page 38 of the Printed Record.)

As to whether this accident was such as is drawn within the Saving Clause of Section 3, of the Act of March 4th, 1907, we cannot present a more comprehensive answer than that given by the Court of Appeals of Kentucky in its opinion which is as follows:

"The appellant did not attempt to bring itself within the provisions of Section 3, of the Act of March 4th, 1907, for its answer contains no plea that its violation of the statute was occasioned by casualty, unavoidable accident, the act of God, or any other cause allowed by that section as an excuse." (Page 51 of the Printed Record.)

III

NEITHER THIS COURT NOR THE COURT OF APPEALS OF KENTUCKY WAS AUTHORIZED BY THE PLEADINGS TO CONSIDER THE CONTRIBUTORY NEGLIGENCE, IF ANY, OF McWHIRTER, BECAUSE THE PLAINTIFF IN ERROR DID NOT PLEAD CONTRIBUTORY NEGLIGENCE IN ANY FORM; AND FURTHERMORE, BOTH CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK AS DEFENSES ARE BARRED BY THE FEDERAL EMPLOYERS' LIABILITY ACT OF 1908. AND THIS COURT IS ALSO WITHOUT JURISDICTION TO CONSIDER WHETHER THE NEGLIGENCE OF THE ENGINEER WAS THE PROXIMATE CAUSE OF THE DEATH OF McWHIRTER, BECAUSE THE LOWER COURT DECIDED THAT THE NEGLIGENCE OF THE ENGINEER AND THE VIOLATION OF THE HOURS OF SERVICE ACT CONCURRED IN CAUSING THE ACCIDENT AND INJURY COMPLAINED OF.

The plaintiff in error did not plead contributory negligence as a defense. By its amended answer, it did undertake to plead that McWhirter accepted his employment with the expressed understanding that he assumed all risks of said employment as to accidents incidents to said employment but it nowhere plead that the accident which caused his death resulted from a hazard incident to said employment, and even if it had undertaken such a plea, it would not have been good under the Act of April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employes in Certain Cases." Sections 3 and 4 of said act are as follows:

> Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employe or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; Provided, that no such employee

who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employee.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such a common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

The Court of Appeals of Kentucky after quoting with approval from the opinions of this Court in the following cases to-wit: B. & O. R. R. Company vs. Interstate Commerce Commission, 221 U. S. 613; C. B. & Q. R. R. Company vs. McGuire, 219 U. S. 549; St. Louis, Iron Mountain & Southern R. R. Company vs. Taylor, 210 U. S. 281; Delk vs. St. L. & S. R. R. Company, 220 U. S. 580; and numerous other cases decided by this Court, proceeds then to the following conclusions:

"In thus requiring of the intestate more than sixteen consecutive hours of service, albeit the excess of service over the sixteen hours was but five or seven minutes, appellant violated the staute, supra; and as the death of the intestate, from the act of its engineer complained of, occured while he was engaged in the required continuous service and after the expiration of the sixteen consecutive hours allowed by the statute, there seems to be no escape from the conclusion that the act of the appellant in thus extending his service beyond the statutory limit was negligence per se, to which the intestate's death must, as a matter of law, be attributed, and, if so, the right of appellee to maintain this action cannot be questioned." (Page 43 of the Printed Record.)

Also,

"While as previously stated, we have been referred to no case determining the carrier's liability for the death of a train employe while engaged in its service, in violation of the restriction contained in the act limiting such service to sixteen consecu-

tive hours, we find numerous cases which, in construing that part of the act, and a previous act, relating to the equipment of cars engaged in interstate commerce with safety appliances, hold that it abolishes the fellow servant doctrine and also the doctrine of assumption of risk; furthermore, that if a railroad in the operation of its cars violates a duty enjoined by the provisions of the act, which results in injury to an employe, such violation imposes upon it the duty to make compensation to the person injured." (Page 47 of the Printed Record.)

Also,

"It should be stated in this connection that at the time of the trial of the Delk case, and until the original safety appliance act of 1893 was amended by that of April 22nd, 1908, contributory negligence on the part of the person injured by a defective car, could be relied upon by a railroad company, as a ground of defense in an action under the safety appliance statute for such injury; but the amendment in question, which was in force when the appellee's intestate in the instant case was injured, excludes such a defense. Schlemmer vs. Buffalo R. & P. Co., July, 1911, Advance Sheets U. S. Supreme Court Reports, 561. As the defense of assumption of risk was abrogated by the original act, neither of these doctrines has any place in this case.

"In view of the foregoing authorities, State and Federal, we conclude that the facts alleged by appellee in her petition, and fairly sustained by the evidence appearing in the record, fasten upon appellant responsibility for her intestate's death. If the grounds of defense interposed by the appellant's answer would be unavailing had the intestate's death been caused by a defective appliance on one of its cars, they must upon principle, be held equally so, where the death was caused by its wrongful act in requiring him to continue in the performance of his duties as a brakeman in its service, beyond sixteen consecutive hours even though the negligence involved in the act was only a concurring cause, operating with the negligence of its engineer, in bringing about the death.

"The requirements of the statute with respect to the safety appliance to be used on appellant's

trains, are no more imperative or mandatory than is the statutory restriction here involved upon its right to suffer its employes to engage in its service more than sixteen consecutive hours. The violation of the statute in either case invites the penalty prescribed, and the offender will not be excused upon a showing of reasonable effort or diligence in attempting to comply with the statutory requirements."

(Page 50 of the Printed Record.)

IV

THIS COURT CANNOT CONSIDER THE FAILURE OF THE STATE COURT TO REMOVE THIS CASE TO THE FEDERAL COURT, BECAUSE THE PLAINTIFF IN ERROR DID NOT PRESENT A TRANSCRIPT OF THE RECORD IN THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF KENTUCKY; NOR DID IT EXCEPT TO THE RULING OF THE STATE COURT IN OVERRULING ITS PETITION AND MOTION TO TRANSFER; AND **FURTHERMORE**, BY THE ACT OF APRIL 5, 1910, ENTITLED "AN ACT TO AMEND AN ACT ENTITLED AN ACT RELATING TO THE LIABILITY OF COMMON CARRIERS BY RAILROAD TO THEIR EMPLOYEES IN CERTAIN CASES, APPROVED APRIL 22, 1908," IT IS PROVIDED THAT "NO CASE ARISING UNDER THIS ACT AND BROUGHT IN ANY STATE COURT OF COMPETENT JURISDICTION SHALL BE REMOVED TO ANY COURT OF THE UNITED STATES."

The petition in this case was filed on August 10, 1910, and more than four months after the above entitled act became a law. The record discloses that on the 10th day of October 1910, the plaintiff in error did present its petition and bond for removal of this case to the United States Circuit Court for the Western District of Kentucky, and the order recites as follows:

"The parties appeared by their attorneys and the Court holds that the bond offered is good and sufficient, and, being fully advised, overruled the motion to transfer this cause to the United States District Court, to which ruling of the Court defendant objects." (Pages 6 and 7 of the Printed Record.)

The Court of Appeals of Kentucky in dealing with this branch of the case says:

> "Appellant also complains of the refusal of the Circuit Court to remove the case to the United States Circuit Court for the District of Kentucky. It appears that the Courts of the several States are by the provision of the statute, supra, and the amendment of April 22nd, 1908, given jurisdiction concurrent with that of the Courts of the United States, in cases arising under the statute. It is true,

appellant's petition rested its right to be removed upon the ground of diversity of citizenship, but as it took no exception to the action of the Court in refusing the removal, its complaint of the removal will not now be entertained." (Page 52 of the Printed Record.)

It will also be borne in mind that no transcript of the record in this case is shown by pleading or otherwise to have been tendered or filed in the United States Circuit Court for the Western District of Kentucky. We therefore deem a discussion of this point as unnecessary.

It will thus be seen that the cause of action in this case is based upon two kinds of negligence,—the one consisting of the violation of duty imposed by the Federal Statute, and the other arising under the common law of negligence. The Kentucky Court of Appeals decided that the pleadings and evidence were sufficient to uphold the verdict and judgment under either branch of the case. This Court is, therefore, without jurisdiction in this case. The writ of error and appeal should be dismissed with damages in favor of the defendant in error.

Respectfully Submitted,

EATON & BOYD,

Attorneys for Defendant in error.

James Denis Moquot,

of Counsel.

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The

Supreme Court of the United States

OCTOBER TERM, 1912

No. 541

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

VS.

MRS. CORDIE McWHIRTER, ADMINISTRATRIX OF THE ESTATE OF ETWAL McWHIRTER, DECEASED,
Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky

Brief to the Merits on Behalf of Defendant in Error

STATEMENT OF THE CASE.

The defendant in error has heretofore submitted a brief with her motion to dismiss this writ of error and appeal, and wherein a statement of the facts in this case is made.

She has also stated her reasons, supported by authority announced by this Court, as to why this Court is without jurisdiction in this case, and why the writ of error and appeal should be dismissed. But since the plaintiff in error has tendered its brief to the

merits, the defendant in error has thought it to be proper to also discuss this case on its merits.

It is alleged (pages 1 to 3 inclusive of the printed record) that the death of the said Etwal McWhirter resulted from and was caused by the negligent and wrongful acts of the plaintiff in error by permitting and requiring him to be and remain on duty more than sixteen consecutive hours next before the accident which caused his death; and that in thus requiring and permitting the decedent to be and remain on duty, the defendant (plaintiff in error) was violating what is generally known as the "Sixteen Hour Law," and that it was while the defendant, (plaintiff in error), was violating the sixteen hour law that the decedent was killed by the train which he was permitted and required to help operate in violation of said law. The uncontradicted evidence (quoted in our original brief herein) is to the effect that this accident occurred either five or seven minutes after the decedent had been on duty for sixteen consecutive hours and while he was yet performing his duties under his employment. In the language of the witness, this crew was seven minutes over time. It was sufficiently pleaded that the plaintiff in error had violated a duty enjoined by the Federal Statutes, and in consequence whereof, the decedent came to his death. The proof shows that the statute was violated and that the decedent was killed by the train on which he was employed, while he was being worked in violation of the Statute. Is the plaintiff in error liable for this death under these circumstances?

QUESTIONS PRESENTED.

We, therefore, respectfully invite the Court's attention to the consideration of the following questions:

1st. Did the violation of the Sixteen Hour Law cause or contribute to the death of the decedent, Etwal McWhirter?

2nd. Did the cause of action for the death of McWhirter survive?

3rd. Did the Kentucky Court of Appeals err in upholding the validity of the Sixteen Hour Law and the Employers' Liability Act?

4th. Did the Lower Court err in instructing the jury, and if so, was the plaintiff in error prejudiced thereby?

5th. There being no issue in the pleadings as to "contributory negligence" or "unavoidable casualty," the Court was not required to submit these questions to the jury.

6th. This Court cannot consider as error the action of the Lower Court in refusing to remove this case to the Federal Court.

7th. Where a cause of action is based upon the violation of a duty enjoined by a Federal Statute, and, also on ordinary neglect,—and both concur in producing the injury complained of, has this Court jurisdiction to entertain an appeal from a judgment based on such concurring causes?

I.

Did the violation of the Sixteen Hour Law cause or contribute to the death of the decedent, Etwal McWhirter?

By an Act of Congress entitled "An Act to Promote the Safety of Employes and Travelers Upon Railroads By Limiting the Hours of Service of Employes Thereon," which became a law on the 4th day of March, 1907, it is provided in section 2 as follows:

> "That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this Act to remain on duty for a longer period than sixteen consecutive hours, and whenever such employee of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted to again go on duty unless he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen consecutive hours in the aggregate in any twenty-four hours period, shall be required or permitted to continue or again go on duty without having had eight consecutive hours off duty."

It was stated in the petition (pages 2 and 3 of the printed record):

> "That at the time of the said accidental death of the aforesaid Etwal McWhirter, the train and locomotive on which he was so employed and on which he was acting in the capacity of flagman for the defendant herein, was engaged in the transportation of freight between the States of Missouri and Illinois, and that the said

train and locomotive aforesaid was an interstate train and was engaged in interstate commerce between the aforesaid States of Missouri and Illinois.

"Plaintiff further says that her cause of action herein arose against the defendant by reason of the wrongful and negligent death of her aforesaid husband, Etwal McWhirter, which was occasioned by the negligent and wrongful acts of the defendant, as aforesaid, in managing and operating its train, while her husband was employed by the defendant, St. Louis, Iron Mountain & Southern Railroad Company, as flagman on a train and locomotive engaged in interstate commerce as aforesaid; that her said husband had been permitted and required by the officers and agents of the defendant to be and remain on duty for a longer period than sixteen consecutive hours next before the aforesaid accident, and in violation of Chapter 29-39, Section 2, 34 Statute 1416, of the Acts of Congress of the United States relating to interstate commerce, and being a part of an Act entitled "An Act to Promote the Safety of Employes and Travelers Upon Railroads By Limiting the Hours of Service of Employes Thereon,' which became a law on the 4th day of March, 1907, and also an act entitled 'An Act Relating to the Liability of Common Carriers By Railroad to Their Employes in Certain Cases,' which became a law on the 22nd day of April, 1908; and that the aforesaid negligent and wrongful acts of the officers and agents of the said defendant, and the said violation of the laws of the United States relating to interstate commerce were the proximate and sole causes of the death of her said husband, and she relies on the laws of the United States made and provided in such cases."

By section 1 of the Employers' Liability Act of April 22, 1908, it is provided:

> "That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories or between the District of Columbia or any of the States and Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, wharves, or other equipment."
>
> Act April 22, 1908, c. 149, Sec. 1, 35 Stat., 65.

By the Act of March the 4th, 1907, the Congress of the United States legislated for the "safety of employees" by limiting the hours of service to sixteen consecutive hours; and by the Act of April 22, 1908, (quoted above), Congress provided that interstate carriers shall be liable in damages to their employees or their personal representatives for injury or death resulting in whole or in part from the negligence of the employe. And provided further (section 3)—

"that no such employee shall be held to have

> been guilty of contributory negligence in any case where the violation by such common carrier of any Statute enacted for the safety of employees contributed to the injury or death of such employee."

The plaintiff in this case relies on these Statutes and stated the case clearly within their provisions. It is stated in the petition that the plaintiff's intestate was killed by a train on which he was employed, and was helping to operate; and that at the time of his injury and death he had been on duty continuously for more than sixteen consecutive hours; and that the railroad permitted and required him to so be and remain on duty. By the Statutes and pleadings, a case is presented. The facts to some extent were denied by the railroad company, but the proof without a single contradiction sustained every material allegation in the petition. The question is, "Does the fact of continuing the employee in his service in violation of the prohibitions of the Statute in itself constitute sufficient negligence on which to base a cause of action?"

This Court in the case of *St. Louis, Iron Mountain & Southern Railroad Company vs. Taylor,* 210 U. S., 281, said:

> "The obvious purpose of the Legislature (i. e. Congress) was to supplant the qualified duty of the Common Law with an absolute duty, deemed by it more just. If the railroad company does in point of fact use cars which do not comply with the standard, it violates the plain provision of

the law, and there arises on that violation the liability to make compensation to one who is injured."

In the case of the *Southern Railroad Company vs. Carson,* 194 U. S., 136, the Court after quoting from the Safety Appliance Act of March 2, 1893, says:

"The trial Court in one of its instructions sets forth this provision and told the jury that if they found the railroad company was engaged and these cars were used in interstate traffic, and that they were not equipped with the automatic couplers required, such failure was negligence; it was further charged that railroads were required to keep their appliances in safe and suitable order. It is objected that the instructions assumed that if the automatic coupler was out of repair, the company failed to comply with the Act of Congress; but we do not think so, and the Supreme Court of the State held that there was no error, as Congress must have intended that the couplers should be kept in proper repair to use, and moreover, as such was the law of the State, even if the Act of Congress had not specifically imposed this duty. By this ruling, no right specifically set up or claimed under the Act of Congress by defendant below was decided against. There was no pretense that the Act of Congress provided that the automatic couplers need not be kept in order, and whether the cars in question were used in moving interstate traffic, and whether the coupling appliances were defective or not, were facts left to the jury and determined by their verdict."

In the recent case of *C. B. & Q. R. R. Company vs. United States,* 220 U. S., 559, and after quoting ex-

tensively from the case of *St. Louis, Iron Mountain & Southern Railroad vs. Taylor, supra,* and approving the foregoing pronouncements, the Court said:

> "It is thus seen that whether the Act of Congress imposed an absolute duty upon the carrier in the matter of the required safety appliance, or whether knowledge or diligence on its part was an ingredient in the act condemned, was a question distinctly presented here by the assignments of error and by counsel on both sides. This Court regarded the question as properly presented on the record, and that its duty was to meet and decide it."

And quoting from the Taylor case with approval, the Court says:

> "In the case before us, the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by Statute. We have nothing to do but ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it

violates the plain prohibitions of the law and there arises from that violation the liability to make compensation to one who is injured by it."

In the case of *B. & O. Railroad Company vs. Interstate Commerce Commission,* 221 U. S., 612, the validity of the Sixteen Hour Law was directly involved, and at pages 618-19 the Court says:

> "The fundamental question here is whether a restriction upon the hours of labor of employees who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employees and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider and to endeavor to reduce, the danger incident to the strain of excessive hours of duty on the part of the engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the Act. And in imposing restrictions having reasonable relation to this end, there is no interference with liberty of contract as guaranteed by the Constitution."

In the case of *C. B. & Q. Railroad Company vs. McGuire,* 219 U. S., 549, the Court expressly upheld

the validity of the Act abrogating the fellow servants rule, saying:

> "And the validity of legislation abrogating the fellow-servant rule, both with respect to the class of cases embraced in the Statute, and also where it is abolished as to railroad employees generally, has been sustained."

In the recent Second Employers Liability Cases, 223 U. S., page 1, after exhaustively considering the legislation on this question, this Court upheld the two Acts relied upon in this case, and laid down the following propositions and approved them:

> "(a) The rule that the negligence of one employe resulting in injury to another was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employe;
>
> "(b) the rule exonerating an employer from liability for injury sustained by an employe through the concurring negligence of the employer and the employe is abrogated in all instances where the exployer's violation of a Statute enacted for the safety of his employes contributed to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the damages corresponding to the amount of negligence attributable to the employe;
>
> "(c) The rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employe vol-

untarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employes contributed to the injury; and,

"(d) the rule denying a right of action for the death of one person caused by the wrongful act or neglect of another is displaced by a rule vesting such a right of action in the personal representatives of the deceased for the benefit of designated relatives."

In the instant case, the injury and death resulted to the intestate while he was being required to work in violation of the Sixteen Hour Law. The Kentucky Court of Appeals construed the working of this man after he had been employed for sixteen hours continuously, as in itself negligence. The Court says (page 44 of the Printed Record):

"Referring to the appellant's violation of the provisions of the Statute prohibiting it from requiring its employes to remain on duty longer than sixteen consecutive hours, we find that the language of the provision in question is mandatory, and that the duty it imposes is a definite absolute duty. Its non-performance may not, therefore, be excused by a showing on the part of the railroad that it used ordinary care or reasonable diligence to perform it, or was unable to do so. The violation of such a statutory duty is, therefore, negligence per se."

The lower Court then quoted with approval from the Supreme Court of Georgia in the case of *Platt vs.*

Southern Photo Material Company, 60 S. E., 1066, (see page 45 of the Printed Record), as follows:

> "Every violation of any of these duties of omission or commission, which, arising from man's estate as a social being, has received recognition by the law of the land, either generally or specifically, is an act of negligence. So long as these duties remain undefined, or defined only in abstract, general terms, a breach is not properly denominated negligence per se; but when any specific act or dereliction is so universally wrongful as to attract the attention of the lawmaking power, and this concrete wrong is expressed by law or ordinance, a violation of this law, a commission of the specific fact forbidden is for civil purposes correctly called negligence per se. In those jurisdictions in which the application of the facts to the law rest with the jury, the Court can not primarily declare that any particular concrete act, or state of circumstances, amounts to a breach of duty unless the law so expressly declares. This finding is left to the jury; but if the law itself puts its finger on a particular thing and says, 'This is wrong,' the Court may also (for there is no question to a fact which the law says exists) put its finger on that same thing and say, 'This is negligence—negligence per se.' This artificial distinction between negligence per se and negligence not per se, respects, therefore, merely the method by which the existence of negligence is to be ascertained in particular instances. When once its existence is determined, whether through the Court's judicial cognizance, or the jury's findings, as a matter of fact, there is no further distinction made, and the one form of negligence

has in the further consideration of the case just the same effect as the other—no more, nor less."

This doctrine is supported by a great array of cases, most prominent among which are the following:

National Casket Company vs. Power, 137 Kentucky, 156; *N. C. & St. L. Railroad Company vs. Higgins,* 92 S. W. (Kentucky), 549; *Cumberland Tel. Company vs. Yeiser,* 141 Kentucky, 15; *Vandeveer vs. Moran,* (Neb.) 112 N. W., 581; *L. & N. R. R. Company vs. Haynes,* (Ind.) 91 N. E., 96. Also the following Federal cases: *St. Louis, Iron Mountain & Southern Railroad Company vs. Taylor,* 210 U. S., 281; *Southern Railroad Company vs. Carson,* 194 U. S., 136; *Delk vs. St. Louis & S. F. Railroad Company,* 220 U. S., 580; *Schlemmer vs. Buffalo R. & P. R. Company,* 220 U. S., 590; *Watson vs. St. Louis, Iron Mountain & Southern Railroad Company,* 169 Federal, 942.

II.

Did the Cause of Action for the Death of McWhirter Survive?

If there is any meaning in the ordinary, plain, simple English which we hear and use every day, there can be no doubt about this. The language employed in section 1 of the Act of April 22, 1908, (quoted *supra*) is:

"That every common carrier by railroad while engaging in commerce between any of the sev-

> eral States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, etc."

Here the employe was instantly killed. He himself never had a cause of action for the injury he received, because his injury and death resulted simultaneously. Under the plain language of the Act, the cause vested in the personal representative "in case of the death of such employee."

Congress evidently perceiving that there would probably arise cases in which an employe might have a cause for injuries to himself, and that his death might intervene before his claim for such injury could be enforced, and, that the carrier might not, on this account, escape its just liability, the Act was amended by the Act of April 5th, 1910, by adding to the original act section 9, which is as follows:

> "That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."
>
> Act April 5, 1910, c. 143, Sec. 2, 36 Stat. 291.

The plaintiff in error lay great stress in the Court below upon the question as to whether the cause for

death survived; but since the attention of its counsel has been called to the case of *Midland Valley Railroad vs. Fulgham,* 181 Federal, 91, in which the Circuit Court of Appeals expressly holds that the cause of action for death vests in the personal representative, we have not heard them seriously insist upon this point.

If any doubt whatever remains as to the right of a personal representative to maintain the action for the benefit of the designated relatives, the doubt is certainly removed by the positive language employed in the Second Employers Liability Cases, 223 U. S., 1, where the Court at page 50 says:

> "The rule denying a right of action for the death of one person caused by the wrongful act or neglect of another, is displaced by a rule vesting such a right of action in the personal representatives of the deceased, for the benefit of designated relatives."

As the cause of action vested immediately in the personal representative for the benefit of the designated relatives as set out in the plaintiff's original petition, on page 1 of the Printed Record, we deem a further discussion of this question unnecessary.

III.

Did the Kentucky Court of Appeals err in upholding the validity of the Sixteen Hour Law and the Employers Liability Act?

In view of the fact that the Kentucky Court of Appeals follows the exact language employed by this Court in construing these two Acts, and in view of the fact that this Court has repeatedly upheld the validity of these Acts, we can not conceive of this Court now giving serious consideration to this question, and we, therefore, rest this matter upon the authority cited in support of the first proposition herein.

IV.

Did the lower Court err in instructing the Jury, if so, was the plaintiff in error prejudiced thereby?

The plaintiff in error complained only of instructions C. and I., which appear on page 17 of the Printed Record and are referred to in the opinion of the Kentucky Court of Appeals on page 51 of the Printed Record. Instruction C is referred to by the Kentucky Court of Appeals as Instruction No. 1. Instruction I is referred to by the Kentucky Court of Appeals as No. 4. Instruction C is as follows:

> "The Court instructs the jury that if you shall believe from the evidence that the train on which the decedent, Etwal McWhirter, was employed at the time of the accident which caused his death, was engaged or employed in interstate commerce; and, if you shall further believe from the evidence that the death of the said Etwal McWhirter resulted from the negligent or wrongful acts of the conductor, engineer, or servants of the defendant, superior in authority to the said Etwal McWhirter, you will find for the

plaintiff such damages as you may believe from the evidence that she has sustained, not to exceed, however, the sum of $25,000.00.

Given February 8, 1911."

The Kentucky Court of Appeals says of this instruction:

> "Instruction No. 1 authorized a verdict for appellee if the train by which her intestate was killed was, at the time, engaged in interstate commerce, and his death was caused by the negligence of the engineer in operating the train. We are unable to see any error in this instruction. It is conceded the train was engaged in interstate commerce, but whether so or not, if the intestate's death resulted from the negligence of the engineer alone, appellant would, as master, be responsible therefor independently of its negligence in violating the Sixteen Hour Law." (Page 51 of the Printed Record.)

We call the Court's attention to the fact that this instruction follows the language employed in the first section of the Employer's Liability Act of April 22, 1908. By this Act, it is provided that the carrier shall be liable in damages "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, etc."

Instruction C required the jury to find, as a matter of fact, that the train on which the deceased was employed was engaged in interstate commerce, and that the death of McWhirter resulted from the negligence

and wrongful acts of the conductor, engineer, or servants of the defendant, *superior in authority* to the said Etwal McWhirter. The instruction was clearly more favorable to the railroad than it was entitled to under the Act.

Instruction I is as follows:

> "The Court further instructs the jury that if you shall believe from the evidence that the said Etwal McWhirter had been permitted or required to be or remain on duty continuously for more than sixteen consecutive hours next before the accident which caused his death, then the defendant was negligent and liable in damages for said injury and death of Etwal McWhirter, if you shall believe from the evidence that the permitting or requiring the said Etwal McWhirter to be or remain on duty continuously for more than sixteen consecutive hours next before his death in any way contributed to the said accident and death, and you will find for the plaintiff such damages as you may believe from the evidence she has sustained by reason of his death, not exceeding the sum of $25,000.00.
>
> Given February 8, 1911." (Page 17 of the Printed Record).

The Court of Appeals of Kentucky in passing on this instruction says:

> "and by instruction 4, the jury, in substance, were told that if they believed from the evidence, appellee's intestate had been permitted or required by appellant to remain on duty as a brakeman continuously for more than sixteen consecutive hours immediately before his death,

> appellant was negligent by reason thereof, and liable in damages for the intestate's death, if they further believe from the evidence such negligence contributed to his death."

The Court further commenting on this instruction, said:

> "This instruction correctly stated the law on the feature of the case intended to be covered by it, and as our reasons for this conclusion have already been fully stated, further elaboration of this is unnecessary." (Page 51 of the Printed Record.)

This instruction is based on section 2 of the Act of March 4, 1907, known as the Sixteen Hour Law, and under this instruction, the jury must have found from the evidence that the intestate had been on duty more than sixteen hours at the time of the accident which caused his death, and that this continued service in violation of the plain prohibitions of the Statute contributed to his death. The plaintiff in error by its pleading in the lower Court affirmatively declared that the deceased was killed—

> "while going in on a siding at Wolf Lake, Illinois, * * * while acting as flagman, went out on the running board on the left side of the engine; went down on the pilot and on to the ground to run ahead to throw the switch, as it was his duty to do to head in at Wolf Lake; and, while running or starting to run, he stumbled or slipped and fell just in front of the engine, and the engine passed over him, killing him at the time." (Pages 7 and 8 of the Printed Record).

Section 3 of the Employers' Liability Act of April 22, 1908, provides:

> "That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any Statute enacted for the safety of employes contributed to the injury of such employee."

The fact of continuing McWhirter in the service after he had been on duty sixteen consecutive hours was per se negligence. It was while he was being worked in violation of the Statute expressly enacted "to promote the safety of employes and travelers," that he was killed by the train of the plaintiff in error. We submit that the causal connection between the violation of the duty enjoined by law on plaintiff in error, and the death of this man, was so closely related that the inevitable conclusion must be that the death would not have occurred except for the fact that the plaintiff in error was requiring the intestate to work at the time he was killed by it. There was no intervening cause. The decedent was killed by the train on which he was employed, while in the performance of his duty, after he had been on duty for more than sixteen consecutive hours. If this does not constitute negligence and if this negligence did not contribute to or cause the death, we have no conception of what is meant by "negligence per se," or why or where it exists.

V.

There being no issue in the pleading as to "contributory negligence" or "unavoidable casualty," the Court was not required to submit these questions to the jury.

The rule in Kentucky is well in the case of *Board of Councilmen of the City of Frankfort vs. Chinn,* 89 S. W., 188, where the Court says:

> "The rule in this state is that the burden of proof as to contributory negligence, is upon the defendant, and in those states where the burden of proof is upon the defendant to show that the plaintiff was guilty of contributory negligence, the universal rule is that the plaintiff need not aver in his pleadings, the absence of contributory negligence."

In the case of *Newport L. & A. Turnpike Company vs. Pirmann,* 82 S. W., 976, the Kentucky Court of Appeals says:

> "The appellant's contention as to the failure of the Court to give an instruction on contributory negligence is likewise not well founded, for the reason that appellant did not plead that appellee was guilty of contributory neglect."

In the case of *Paducah & Memphis Railroad Company vs. Hoehl,* 12th Bush, 41, the doctrine prevailing in Kentucky is well stated, where the Court says:

> "While the burden of proof is on the appellee to make out her case, the onus is on the appellant to show that the appellee's own negligence contributed to the injury complained of. The au-

> thorities on this branch of the case are somewhat conflicting; but it seems to us that it is reversing the well recognized rule of pleading in requiring the plaintiff to allege and prove the non-existence of facts that when established would constitute a defense to his own action."

The Court then quoting with approval from the *Washington & Georgetown Railroad Company vs. Gladmon,* 15 Wallace, 407, says:

> "The later cases in the New York Court of Appeals, I think, will show that the trials have almost uniformly proceeded upon the theory that the plaintiff is not bound to prove affirmatively that he was himself free from negligence, and this theory has been accepted as the true one."

It thus appears that the rule adopted and followed in Kentucky is the same as that adopted and followed in this Court. The same rule has been followed generally by the Federal Courts, and as is well said in the case of *Western Real Estate Trustees vs. Hughes,* 172 Federal, 206:

> "By the uniform course of decision in the Federal Courts, the plaintiff was entitled to rest upon the presumption that he was without fault or negligence until the contrary in some way was made to appear, and the burden of alleging and proving the contrary rested upon the defendant."

For the very same reason, the Court did not err in charging the jury on the question of unavoidable casualty. The pleadings did not present an issue of

unavoidable casualty and there was not a particle of proof tending to show that the injury and death complained of were occasioned by an unavoidable casualty.

VI.

This Court can not consider as error the action of the lower Court in refusing to remove this case to the Federal Court.

Plaintiff in error tendered its petition and bond for the removal of this case to the United States District Court for Kentucky on the 10th day of October, 1910, and the following proceedings were had thereon:

> "The parties appeared by their attorneys and the Court holds that the bond offered is good and sufficient and, being fully advised, overruled the motion to transfer this cause to the United States District Court, to which ruling of the Court defendant objects." (Pages 6 to 7 of the Printed Record).

It will be observed that the defendant did not "except" to the ruling of the Court. By section 333 of the Kentucky Civil Code of Practice, it is provided:

> "An exception is an objection taken to a decision of the Court upon a matter of law.
>
> "A party may without a previous objection, except to a decision against him, unless it be made at the instance of the adverse party.
>
> "But a party cannot except to a decision made at the instance of the adverse party, unless objection shall have been made to the motion, offer or request of the adverse party."

The Kentucky Court of Appeals, passing on this question in this case (Page 52 of the Printed Record) says:

> "It appears that the Courts of the several States are, by the provision of the Statute, supra, and the amendment of April 22nd, 1908, given jurisdiction concurrent with that of the Courts of the United States, in cases arising under the Statute. It is true, appellant's petition rested its right to be removed on the ground of diversity of citizenship, but as it took no *exception* to the action of the Court in refusing the removal, its complaint of the removal will not now be entertained."

It was not sufficient for the defendant to merely "object" to the making of the order, but it was necessary that it except to the ruling of the Court and have its exception noted on the record.

In the case of *Buckles vs. Commonwealth,* 113 Kentucky, 795, the Kentucky Court of Appeals, approving the construction placed by that Court upon the section of the Code quoted, supra, says:

> "Where, however, the Court sua sponte does something he need only except, but when it comes from the opposing party, he should first object, and then after the Court's decision, except to its action."

Without referring to the long line of Kentucky cases sustaining this position, we submit that even if proper exceptions had been taken, the lower Court was right in refusing to remove this case, because by

the Act of April 22, 1908, as amended by the Act of April 5, 1910, it is specifically provided by section 6 thereof, as follows:

> "The jurisdiction of the Courts of the United States under this Act shall be concurrent with that of the several States, and *no case* arising under this Act and brought in any State Court of competent jurisdiction, shall be removed to any Court of the United States."

This Act was in effect long before this suit was commenced and of course is applicable to the case at bar. By the plain language of this Act, this action arose under the very terms of the Act, was based on the Act, and commenced in a State Court of competent jurisdiction, and cannot therefore be removed to any Court of the United States.

VII.

Where a cause of action is based upon the violation of a duty enjoined by a Federal Statute, and, also an ordinary neglect,—and both concur in producing the injury complained of, has this Court jurisdiction to entertain an appeal from a judgment based on such concurring causes?

We have already considered this matter at some length in our brief on our motion to dismiss the appeal and writ of error for want of jurisdiction. We have shown that the Kentucky Court of Appeals found that there were two kinds of negligence alleged in this case; that by the original petition, the negligence resulting from the violation or duty enjoined

by the Statute was the direct and proximate cause of the death of the intestate, and by her amended petition she charged that the death was occasioned by the wrongful and negligent acts of the conductor and engineer also. Thus as was correctly stated by the Kentucky Court of Appeals, the concurring negligence of the railroad company and the engineer,—the one by requiring and permitting the brakeman to be on duty for more than sixteen consecutive hours, the other by failure to keep a proper lookout for the brakeman when he knew he was going out in front of the train in a dangerous place,—resulted in producing the death complained of. So far as the merits of the case is concerned, it is immaterial whether the engineer was negligent in failing to keep a lookout. The negligence of the railroad company consisting in working the defendant in violation of the sixteen hour law is established, not only by the preponderance of the evidence, but there is not a particle of evidence to the contrary.

The Court of Appeals says that the cause is made out both by the common law of negligence and by the negligence per se resulting from the violation of the imposed duty prescribed by Statute. It is therefore not necessary to consider whether at common law an action for death survived or whether there was an action for death. It is sufficient to state that by the Constitution and laws of Kentucky an action for death occasioned by wrongful or negligent act is vested in the personal representative of the deceased person.

Section 241 of the Constitution is as follows:

> "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to who belong; and until such provision is made the same shall form part of the personal estate of the deceased person."

The Kentucky Legislature has provided in section 6 of the Kentucky Statutes as follows:

> "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case, damages may be recovered for such death of the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is willful, or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased."

This action was commenced in Kentucky and, of course, the pleading is under the Kentucky Code. It was sufficient to comply with the rules of pleading in this State, and the Court of Appeals have approved the pleading. By section 119 of the Civil Code it is provided:

> "That neither the evidence relied on by a party nor presumption of law, nor facts of which judicial notice is taken, excepting private Statutes, shall be stated in a pleading. In pleading a private statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law."

The Kentucky Court of Appeals construed this section of the Code in the case of *L. & N. R. R. Company vs. Scott,* 133 Kentucky, 724. That was an action based upon the Act of Congress approved June 29th, 1906, known as the "Carmack Amendment to the Interstate Commerce Law." The petition did not set out the terms of the Act but merely set out the facts constituting the violation of the provisions of the Act. The Court in that case expressly held that a State Court "will take judicial notice of the federal constitution and its amendments and of federal public statutes."

The Court further says in quoting from *Claflin vs. Houseman*, 93 U. S. 136:

> "The laws of the United States are laws in the several States and just as much binding on the citizens and Courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and within its jurisdiction, paramount sovereignty. Every citizen of the State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State,—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights acquired under

> either system of laws may be enforced in any Court of either sovereignty competent to hear and determine such kind of rights, and not restrained by its constitution in the exercise of such jurisdiction."

The Court then stated that it was unnecessary for the plaintiff to set out the Statute relied upon, as it must take judicial notice of this law,—the Court adding:

> "When the plaintiff states the facts in his pleadings entitling him to recover under the law of which the Court must take judicial notice, he has stated a cause of action."

And in this same opinion the Court used this language:

> "Accordingly we have uniformly given judgment against carriers where they had in shipping stock from one State to another, failed to water the stock as required by the Act of Congress, without any reference in the pleadings to that Act."

It is also provided by Section 1640 of the Kentucky Statutes, "That the unwritten or common law of any other of the United States, may be proved as facts by parol evidence of persons learned in that law. The printed books of cases adjudged in the Courts of a sister State may also be admitted as evidence of such law."

The act complained of in this case was committed in the State of Illinois. By the Act of February 12th, 1853, entitled, "An Act requiring compensation for

causing death by wrongful act, neglect, or default," as amended by Act of May 13, 1903, and being chapter 70 of Hurd's Revised Statutes of Illinois, it is provided by section 1 that whenever death shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereto, then the person causing such death or injury is declared to be liable therefor. By section 2 of said act, it is specifically provided that every such action shall be brought by and in the name of the personal representatives of such deceased person. The law in Illinois and Kentucky is practically the same respecting the liability and the right to recover for wrongful or negligent death. Of course there is a radical difference in the system of pleading prevailing in the two jurisdictions.

But waiving, for the purpose of argument, the question of jurisdiction and considering the case upon its merits, we commend the opinion of the Court of Appeals of Kentucky in this case to the earnest consideration of this Court as setting forth in plain unanswerable terms, the reason why this case should be affirmed. In concluding its opinion after amply and exhaustively considering all the phases and features of this case, the lower Court says:

> "In conclusion, we are moved to say that the salutary object designed by the enactment of the statute, supra, would in our opinion, be defeated if we should hold its provisions inapplicable to a case like the one at bar. Its aim is the protection

of the lives of employes of railroad companies, and also the lives and property entrusted to the railroads as common carriers. It recognizes that there is a limit to human endurance and that hours of rest and recreation, as well as the use of good machinery and appliances, are needful to the health and safety of men engaged in the hazardous work of railroading and that the benefit it is intended to confer will better enable them to serve their employers and promote the ends of commerce. The application of the provisions of the statute may sometimes bear harshly upon an offending railroad company, but, on the whole, their just enforcement in all proper cases, is bound to be promotive of the public welfare. The errors assigned not justifying a reversal, the judgment is affirmed." (Page 52 of the Printed Record).

OTHER QUESTIONS PRESENTED.

There are several other questions suggested in the argument submitted for the plaintiff in error,—such for instance as that the death was not the proximate result of the violation of the Sixteen Hour Law for the reason that there was no causal connection between the two. We have already in considering another phase of this case, referred to this matter. While the plaintiff in error contends that the violation of the Sixteen Hour Law must have in some way produced the injury and death, it yet admits that it would still be liable unless the death were caused by some independent intervening cause not connected with the violation of the Statute. In volume 29, Cy-

clopedia of Law and Procedure, page 635, the rule is well stated as follows:

> "When the measure of duty is defined by the law and is the same under all circumstances, its omission is negligence, and may be so declared by the Court."

This rule has been adopted and followed in this Court (*Insurance Company vs. Tweed,* 7th Wall., 44), and by practically all of the State Courts. But the plaintiff in error cannot dodge the issue by its interminable discussion of abstract propositions, nor by its frequently repeated assertions of inability to conceive of the causal connection between the violation of the Sixteen Hour Law and the death of the man who lost his life in consequence thereof. The wrong complained of here and for which the railroad is liable, is the keeping this train crew on duty for more than sixteen hours. The duty of this crew including the deceased was to operate this train. It was by operating this train under these circumstances that the death was produced. There was no intervening cause; there was no negligence except the negligence of the railroad in continuing this crew on duty in violation of the law, and the negligence of its engineer in failing to keep a lookout for the brakeman when the engineer knew that in the performance of what is admitted by the railroad was the duty of the brakeman, he was compelled to go out in front of the engine.

CONCLUSION.

The law has become so well settled in this country and in this Court upon the issue involved upon the merits in this case that we deem a further discussion as an unnecessary tax upon the patience of the Court. The assignments of errors presented by the railroad in this case are, for the most part, restatements of the same objections in different forms. The Court of Appeals of Kentucky did not hold in its opinion that the railroad company was an insurer of the safety of its employees under the Federal Hours of Service Act, nor did it hold that the railroad was an insurer of the lives of its employees while they were being worked in violation of the law; but the Court correctly held that the act of working the employes in violation of the law constituted negligence, and if they suffered injury at the hands of the employer, or from the instrumentalities they were operating, or which the employer was at the time operating, then the employer was liable for the injury at least to the extent that the employer's negligence contributed thereto. The Kentucky Court of Appeals did not hold that contributory negligence was not available as a defense in this case by way of diminution of damages, because the question was not presented to the Court for consideration. The lower Court did not hold that the plaintiff in error was an insurer of the deceased against the personal negligence of the engineer; nor did the Court of Appeals err in upholding the correctness of instructions "C" and "I"; nor did the Kentucky Court of Appeals err in holding

that there was sufficient evidence on which to base the verdict and judgment complained of.

It was alleged in the petition and never denied that the plaintiff's intestate was a young and able bodied man, 34 years of age, and that his expectancy of life was at the time of his death more than 28 years; that he was capable of earning $100.00 per month, and that he was the sole and only support for his wife and children. There is no conflict in the evidence on this point. The widow, Mrs. McWhirter, was introduced as a witness for the plaintiff and without objection testified that she was the surviving widow of the deceased; that he left surviving him four children; that their ages were 13, 10, 7 and 5 years, respectively; that his age at the time of his death was 36 years; that he had been engaged in the railroad business 13 years and was capable of earning from $100.00 to $125.00 per month. (Page 35 of the Printed Record). In this condition of the Record, the plaintiff in error "complains" of a verdict and judgment for $3,000.00.

We, therefore, respectfully submit this case with the firm conviction that the law is for the defendant in error and should be so declared; that the evidence fully sustained her cause; that the pleadings amply present her case, and that the judgment complained of and appealed from, is a just and honest judgment and that this Court in its impartial disposition of this case, must, in keeping with the present well

established law of the land, affirm this judgment with damages.

Respectfully submitted,

James Denis Moegnot.

WILLIAM V. EATON,

AUBREY EVERETT BOYD,

For Defendant in Error.

11

MAY 29 1912

JAMES H. McKENNEY

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

MRS. CORDIE McWHIRTER, Administratrix of the Estate of ETWAL McWHIRTER, Deceased,
Defendant in Error.

No. 541

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

SUGGESTIONS AND BRIEF IN OPPOSITION TO MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR. ALSO, STATEMENT OF CASE, ASSIGNMENT OF ERRORS AND BRIEF OF PLAINTIFF IN ERROR ON THE MERITS.

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E. T. BULLOCK and
R. T. RAILEY,
Attorneys for Plaintiff in Error.

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell Main 1819.

SUBJECT INDEX ON MOTION TO DISMISS WRIT OF ERROR.

Defendant's brief in opposition to motion to dismiss writ of error (this brief, pp. 2 and following).

I.

It is claimed in the motion to dismiss that a common law cause of action was stated in the petition, shown by the proof and sustained by the Court of Appeals, by which this Court is shorn of jurisdiction. No common law cause of action was either alleged or shown, and the case was tried under the Hours of Service Act (this brief, p. 2).

Acme Harvester Co. v. Beekman Lbr. Co., 222 U. S. 305-6 (this brief, p. 5);
Broom's Legal Maxims (4th London Ed.), p. 667 (this brief, p. 2);
Fulgham v. Ry. Co., 167 Fed. 663-4 (this brief, p. 2);
Gilkeson v. Ry. Co., 222 Mo. 173 (this brief, p. 2);
Mobile Life Ins. Co. v. Brame, 95 U. S. 754.

(*a*) The petition states no cause of action either at common law or otherwise (this brief, pp. 6 and following).

Carroll's Ky. Code (1906 Rev.), Sec. 4, p. 18 (this brief, p. 7);
Clark v. Dillon, 97 N. Y. 370;

Gibson v. Ry. Co., 225 Mo. 481-3, inc. (this brief, p. 10);
Louisville Canal Co. v. Murphy, 9 Bush 522 (Ky.) (this brief, p. 8);
Mallinckrodt Chem. Wks. v. Nemnich, 169 Mo. 395 *et seq.;*
Paganes v. City of Chicago, 111 Ill. App. 590;
Pier *et al.* v. Heinrichoffen *et al.*, 52 Mo., *l. c.* 335-6 (this brief, p. 9);
Sargent v. Baublis, 215 Ill. 428, s. c. 74 N. E. 455;
Schueler *et al.* v. Mueller, 61 N. E. 1044 (Ills.);
Sidway v. M. L. & L. S. Co., 163 Mo. 372-5;
Sou. Ry. Co. v. King, 217 U. S. 536-7, *l. c.* (this brief, pp. 11 and 12);
Stivers v. Baker *et al.*, 87 Ky. 508, s. c. 9 S. W. 491-2;
Willard v. Zehr, 215 Ill. 148, s. c. 74 N. E. 107 (this brief, p. 12);

(*b*) There was no testimony adduced tending to show a common law cause of action. There was no negligence shown on part of the engineer (this brief, p. 14; Record, pp. 64-70, inc.)

(*c*) Deceased and the engineer were fellow-servants at common law, and hence no right of action at common law could exist in behalf of decedent's widow as against the principal.

Beutler, Admr., v. Ry. Co., 32 Sup. Ct. Rept'r. No. 11, p. 402 (this brief, p. 14).

(*d*) Plaintiff in a single count attempted to plead the Employers' Liability Act and Sixteen-Hour Law

as a basis of recovery. If any action exists, it must be under one or the other of these statutes (this brief, p. 15).

II.

The second ground urged by defendant in error for dismissing the writ of error is based upon the alleged negligence of the engineer, which is disposed of in the preceding proposition (this brief, pp. 16 to 18, inc.)

III.

The third ground assigned by defendant in error for the dismissal of the writ of error is that contributory negligence and assumption of risk were not defenses open to defendant, and that this Court is without jurisdiction to consider the negligence of the engineer as the proximate cause of the death of plaintiff's intestate, for the reason that the lower court decided that the **negligence of the engineer and the violation of the Sixteen-Hour Law concurred** in causing the accident and injury complained of. This position, it is claimed, is untenable and cannot be sustained (this brief, pp. 13-21).

Acme Harvester Co. v. Beekman Lbr. Co., 222 U. S. 305-6 (this brief, p. 20);

Chaney v. Railway Co., 176 Mo. 598 (this brief, p. 19);

Hudson v. Railway Co., 101 Mo. 30 (this brief, p. 19).

IV.

The fourth ground upon which defendant in error asks that the writ of error be dismissed is based upon the idea that no exception was saved to the overruling of the petition to transfer the cause to the Federal Court, which was filed by defendant in the trial court (this brief, pp. 21, 22).

Defendant did except to the action of the Court in overruling its petition to transfer (Rec., pp. 6 and 7).

SUBJECT INDEX AS TO RECORD AND PROCEEDINGS FROM THE COMMENCEMENT OF THE ACTION IN THE TRIAL COURT TO THE FILING OF TRANSCRIPT IN THIS COURT.

Plaintiff's petition (this brief, pp. 25 to 28, inc.)

Plaintiff's petition (this brief, pp. 25 t o 28, inc.)

Defendant's petition and bond for removal (this brief, p. 29).

Defendant's answer (this brief, pp. 29 to 31, inc.)

Plaintiff's reply (this brief, pp. 31-32).

Defendant's amendment to answer (this brief, pp. 32-33).

Plaintiff's amended petition and reply (this brief, pp. 33-4).

Trial and evidence (this brief, pp. 34 and following).

Plaintiff's evidence (this brief, pp. 34 to 43, inc.; also Printed Record, pp. 19 to 28, inc., and 35, 36).

Defendant's evidence (this brief, p. 43; also Printed Record, pp. 37 and 38).

Witnesses for plaintiff:

H. O. Guess, engineer (this brief, pp. 35-38, inc.; Printed Record, pp. 19-22);

F. A. Roberson, telegraph operator (this brief, pp. 42-3, inc.; Printed Record, pp. 23-25, inc.);

G. C. Loper, conductor (this brief, pp. 42-3; Printed Record, pp. 25 to 28, inc.);
Mrs. Cordie McWhirter (Printed Record, p. 35);
Mr. W. V. Eaton (Printed Record, p. 36).

Witness for defendant:

Conductor G. C. Loper, recalled (this brief, p. 43; Printed Record, pp. 37-8). No other witness was examined by defendant.

Demurrer to evidence (this brief, p. 43; Printed Record, p. 10).

Instructions "C", "E", "H" and "I" given at instance of plaintiff over the objection of defendant (this brief, pp. 44-5; Printed Record, pp. 17-18).

Instruction "X" given by the Court at its own instance over the objections of both parties (this brief, pp. 45-6; Printed Record, pp. 10 and 18).

Verdict and judgment. Verdict was rendered for $3,000 and judgment entered accordingly (this brief, p. 46; Printed Record, p. 10).

Defendant's motion for a new trial (this brief, p. 46; Printed Record, p. 18).

Appeal to Kentucky Court of Appeals. Affidavit and bond for appeal were duly filed in the trial court, and the cause appealed to the Kentucky Court of Appeals (this brief, p. 47; Printed Record, p. 18).

Opinion of Kentucky Court of Appeals (this brief,

pp. 47 to 68, inc.; Printed Record, pp. 40 and following).

Defendant's motion for rehearing (this brief, pp. 68 to 70, inc.; Printed Record, pp. 53-4).

Defendant's brief in support of motion for rehearing (this brief, p. 70; Printed Record, p. 59).

Plaintiff's response to petition for rehearing (this brief, p. 70; Printed Record, pp. 88-9).

Motion for rehearing overruled (this brief, p. 71; Printed Record, p. 89).

Petition for writ of error; assignment of errors and writ of error bond presented to Chief Justice of Kentucky Court of Appeals; writ of error allowed, citation issued and service thereon waived (this brief, p. 71; Printed Record, pp. 90 and following).

Transcript filed in this court and record printed and served upon opposing counsel (this brief, p. 71).

Employers' Liability Act of 1908 (this brief, pp. 72-4, inc.; Printed Record, pp. 54-5).

Employers' Liability Act, Amendment of 1910 (this brief, pp. 74-5; Printed Record, pp. 56-7).

Hours of Service Act (this brief, pp. 76-8, inc.; Printed Record, pp. 57-8, inc.)

Assignment of Errors (this brief, pp. 79-86, inc.; Printed Record, pp. 90 to 94, inc.)

SUBJECT INDEX TO SPECIFICATIONS OF ERROR AND BRIEF IN SUPPORT OF SAME.

Specification of Error I.

(This brief, pp. 26 and 27 and pp. 87 to 89. inc.).

(*a*) No common-law cause of action was stated in the petition, as the right of personal action died with the person (this brief, pp. 2 to 15, inc., and p. 89).

(*b*) Plaintiff's intestate and the engineer were fellow-servants at common law, and no right of action could be maintained by plaintiff as a common-law right (this brief, p. 90).

(*c*) Plaintiff's petition fails to state a cause of action and simply pleads legal conclusions (this brief, pp. 6 to 16 and p. 90).

(*d*) The Employers' Liability Act of 1908, and as amended in 1910. The petition fails to state a cause of action under said Act (this brief, pp. 90 and 91).

Brinkmeier v. M. P. Ry. Co., 32 Sup. Ct. Rept'r. U. S. 412.

(*e*) Plaintiff's intestate and the engineer were fellow-servants, and no right of action can be maintained at common law or under the Employers' Liability Act (this brief, pp. 91 to 98, inc.).

Beutler, Admr., v. Railway Co., 32 Sup. Ct. Rept'r. 402.

(*f*) Hours of Service Act. The petition fails to state

a cause of action under said Act (this brief, pp. 98 to 101, inc.).

Brinkmeier v. Ry. Co., 32 Sup. Ct. Rept'r. 412 (this brief, p. 99);
Kerlin v. Ry. Co., 128 N. W. 548 (this brief, p. 99);
Lloyd v. Railway Co., 66 S. E. 604 (this brief, p. 99);
Smith v. Railway Co., 87 S. W. 1052 (this brief, p. 99).

Specification of Error II.

The Court of Appeals erred in holding that there was any evidence tending to prove negligence upon the part of the conductor or engineer (this brief, pp. 101 to 107, inc.).

I Bailey on Personal Injuries Relating to Master and Servant (1st Ed.), 1121 *et seq.;*
Gilbert v. Railway Co., 128 Fed. 534;
Hirsch v. Bread Co., 150 Mo. App. 174;
Moore v. Railway Co., 146 Mo. 572;
Pa. Co. v. Shaughnessy, 122 Ind. 588, s. c. 23 N. E. 675;
Smith v. F. N. Box Co., 193 Mo. 737;
I White on Personal Injuries on Railroads, Sec. 140, and cases cited.

(All of the above cases appear on page 105 of this brief.)

Specification of Error III.

The Court of Appeals erred in sustaining the trial court as to the legality of plaintiff's instruction "C" (this brief, pp. 107 to 109, inc.).

Instruction "C" set out (this brief, p. 107; Record, p. 91).

Specification of Error IV.

The Court of Appeals erred in holding defendant liable as an insurer or otherwise under the Employers' Liability Act of 1908 (this brief, pp. 109 to 112, inc.).

Specification of Error V.

The Court of Appeals erred in holding that contributory negligence and assumption of risk were not available as defenses, if a right of action existed under the Sixteen-Hour Law (this brief, pp. 112 to 115, inc.).

Kerlin v. Railway Co., 128 N. W. 548;
Lloyd v. Railway Co., 66 S. E. 604;
Smith v. Railway Co., 87 S. W. 1052.

(The three cases cited appear on p. 114 of this brief.)

Specification of Error VI.

The Court of Appeals erred in holding that plaintiff was entitled to recover under the Sixteen-Hour Law,

although deceased was assisting in its violation when the accident occurred, if the statute was violated at said time (this brief, p. 115; see authorities under Specification Five, *supra*).

Specification of Error VII.

The Court of Appeals erred in refusing to hold that deceased was killed by his own act operating as an independent, intervening cause, without any negligence on part of the defendant (this brief, pp. 115 to 117, inc.).

Specification of Error VIII.

The Court of Appeals erred in holding that plaintiff was entitled to recover under the Hours of Service Act, and especially erred in holding that defendant was an insurer of the deceased under said Act (this brief, pp. 117 to 120, inc.).

Ives v. Ry. Co., 94 N. E. 431 (N. Y.) (this brief, p. 119);
B. & O. Ry. Co. v. Abbegglen, 84 N. E. 566;
Hutchinson v. Railway Co., 161 Mo. 246;
I. C. Ry. Co. v. Willis, Admr., 97 S. W. 21;
Murray v. Railway Co., 176 Mo. 189;
Pakalinsky v. Railway Co., 82 N. Y. 424.

(The last five cases cited will be found on page 120 of this brief.)

Specification of Error IX.

The Kentucky Court of Appeals erred in sustaining the trial court in holding that plaintiff's instruction "I" (Record, pp. 17-18 and 92) properly declared the law (this brief, pp. 121 *et seq.*).

Said instruction "I" is set out in full on page 121 of this brief.

Specification of Error X.

The Court of Appeals erred in approving said instruction "I" discussed under former proposition (this brief, p. 125).

Louisville Gas Co. v. Kaufman, S. & Co., 105 Ky. 156;
L. & N. Ry. Co. v. Guest's Admr., 106 S. W. 817;
Warner v. Railway Co., 178 Mo. 134, *l. c.*

(The three cases above mentioned are cited on page 125 of this brief.)

Specification of Error XI.

The Kentucky Court of Appeals erred in holding that the provisos in Section 3 of the Hours of Service Act do not apply to the case at bar because the answer of defendant did not plead same.

Baggaley v. P. & L. Sup. Iron Co., 33 C. C. A. 202;
Carter, Webster & Co. v. U. S., 74 C. C. A. 397;
In re Day, 181 Ill. 73, s. c. 50 L. R. A. 521;
Ga. Banking Co. v. Smith, 128 U. S. 121.

(These four cases cited on p. 130 of this brief.)

Hudson v. Railway Co., 101 Mo. 13 (this brief, p. 131).

Specification of Error XII.

The alleged violation of the Sixteen-Hour Law was not the proximate cause of the death of plaintiff's intestate (this brief, p. 133).

Brief of Argument.

The alleged violation of the Sixteen-Hour Law was not the proximate cause of the death of plaintiff's husband (this brief, pp. 134 to 176, inc.).

A. T. & S. F. Ry. Co. v. Calhoun, 213 U. S. 1 (Ok.) (brief, pp. 159-162);

Atkinson v. Ry. Co., 90 Mo. App. 489;

Beach on Contributory Negligence (2d Ed.), Sec. 31 (brief, p. 140);

Broom's Legal Maxims, Sec. 215 (brief, p. 138);

Cin. N. O. & T. P. Ry. Co. v. Mealer, 50 Fed. 725 (Tenn.);

Cole v. G. S. & L. Society, 124 Fed. 113 (Utah) (brief, pp. 170-176);

Cooley on Torts, pp. 68 to 71, inc. (brief, pp. 135-6);

Cuff v. Railway Company, 35 N. J. L. 10;

III Elliott on Railroads (1st Ed.), Sec. 1310 (brief, pp. 139-40);

Fowlkes v. Railway Co., 32 S. E. 464-5 (Va.) (brief, pp. 155-6);

Georgetown Tel. Co. v. McCullough's Admr., 80 S. W. 782 (Ky.) (brief, pp. 145-6);

Gwyn v. Railway Co., 155 Fed. 88 (Tenn.) (brief, pp. 168-170);

Henry v. Railway Co., 76 Mo. 288 (brief, pp. 147-151);

Holman v. Railway, 62 Mo. 564, *l. c.* (brief, pp. 146-7);

Jarnagin v. T. P. A., 133 Fed. 892 (Tenn.);

Lauterer v. Manhattan Ry. Co., 128 Fed. 540 (N. Y.);

Logan v. Railway Co., 139 Ky. 202, s. c. 129 S. W. 575-577 (Ky.) (brief, pp. 141-2);

Logan v. Ry. Co., 96 Mo. App. 461 (brief, pp. 153-4);

L. & N. Ry. Co. v. Long's Admr., 117 S. W. 359, 361 (Ky.) (brief, p. 142-145);

McClary v. Sioux City, Etc., Ry. Co., 3 Neb. 44 (brief, pp. 157-8);

Mella v. N. S. S. Co., 162 Fed. 499 (N. Y.) (brief, pp. 165-6);

M. & St. P. Ry. Co. v. Kellogg, 94 U. S. 469 (Iowa);

Minn. St. Ry. Co. v. Odegaard, 182 Fed. 56 *et seq.* (Minn.);

Ray's Negligence of Imposed Duties (Personal), pp. 133, 134 (brief, p. 139);

Renner v. Canfield, 36 Minn. 90, s. c. 30 N. W. 435;

Rockford v. Tripp, 83 Ill. 347 (brief, p. 158);

Scheffer v. Ry. Co., 105 U. S. 249 (Va.) (brief, pp. 162-165);

Searle v. Ry. Co., 65 Tex. 274;

Setter's Admr. v. City of Maysville, 69 S. W. 1074 *et seq.*;

Shearman & Redfield on Neg. (5th Ed.), Secs. 25 and fol.;

Sira v. Wabash Ry. Co., 115 Mo. 127 (brief, pp. 151-2);

Stone v. Ry. Co., 51 N. E. 1 *et seq.* (Mass.) (brief, pp. 156-7);
Swearingen v. Ry. Co., 221 Mo. 644 (brief, pp. 152-3);
Teis v. Smuggler Mining Co., 158 Fed. 260 (Colo.) (brief, pp. 166-7);
I Thompson's Com. on Law of Neg. (2d Ed.), Sec. 45 (this brief, pp. 140-141);
U. S. F. & G. Co. v. Bank, 145 Fed. 273 (Iowa);
Watson on Damages for Personal Injuries, Secs. 33-35;
Webb's Pollock on Torts (Enlarged Am. Ed), p. 29 *et seq.;*
I White on Personal Injuries, Secs. 20 to 39, inc. (this brief, p. 141).

(All of the foregoing authorities set out on pp. 136-8 of brief.)

Conclusion.

(This brief, pp. 176-7.)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

MRS. CORDIE McWHIRTER, Administratrix of the Estate of ETWAL McWHIRTER, Deceased,
Defendant in Error.

No. 970.

SUGGESTIONS AND BRIEF IN OPPOSITION TO MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR.

Upon pages one and two of her brief, defendant in error has set out four grounds, numbered respectively, first, second, third and fourth, upon which this Court is asked to dismiss the writ of error heretofore sued out in this cause. We shall endeavor to discuss each proposition in the order presented.

Upon page one of the brief of defendant in error, it is said:

> "**First.** The petition and amended petition stated a good cause of action, both at the common law and under the Federal Employers' Liability Act of 1908. There was evidence to support each of these causes and this was so decided by the Kentucky Court of Appeals; and the defendant in

error having rested her case upon both the Federal and non-federal causes, this court is without jurisdiction and the writ of error should be dismissed."

In our opinion, this proposition really presents the entire question as to whether or not this court has jurisdiction of the cause.

It is insisted by defendant in error that the Kentucky Court of Appeals, in addition to sustaining the plaintiff's right of recovery under the Federal Employers' Liability Act of 1908, likewise predicated its decision upon the alleged **common law cause of action based upon the charge of negligence lodged against the engineer in running over the deceased at the time and place of accident.** We shall undertake to demonstrate, that no recovery could be had either in the court below, or in this court, upon any **common law** cause of action.

I.

No right of action survived to plaintiff, as administratrix or otherwise, at common law. Actio personalis moritur cum persona.

Broom's Legal Maxims (4th London Ed.), p. 667;
Mobile Life Ins. Co. v. Brame, 95 U. S. 754;
Fulgham v. Railway Co., 167 Fed. Rep. 663-4;
Gilkeson v. Railway Co., 222 Mo. 173, and numerous cases cited.

In the case of

Mobile Life Ins. Co. v. Brame, 95 U. S. 754,

Mr. Justice Hunt, speaking for the Supreme Court of the United States, said:

"The authorities are so numerous and so uni-

> form to the proposition that, by the common law, no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and many of the state courts, and no deliberate, well-considered decision to the contrary is to be found."

We can imagine, no clearer or more forcible statement of the law than that contained in the foregoing quotation.

In determining the question of jurisdiction in this court, let us **eliminate** for the present the **Employers' Liability Act** and the **Hours of Service Act** pleaded in the petition. Let us also assume the alleged common-law cause of action relied upon to be a ground for depriving this court of jurisdiction. We would then have the plaintiff, Mrs. McWhirter, suing the defendant in the State of Kentucky for the death of her husband which occurred in the State of Illinois, in which suit the railway company is charged with negligence because its engineer, while engaged in interstate commerce, ran over the deceased at the time and place of accident. If **this Court**, and the other courts referred to, are correct in saying that **a personal right of action dies with the person**, then what authority, aside from the Federal statutes pleaded, would the administratrix have for maintaining this action under the common law?

In view of the elementary principles above enunciated, it seems to us that the mere statement of the proposition would eliminate the above contention with regard to the want of jurisdiction in this court. The foregoing is not only declaratory of the law of this court, but that of practically every state in the Union.

Before the administratrix could maintain any kind of an action, it would be necessary for her to plead in her petition, either some **Federal statute** or the **statute of the State where the accident occurred,** in order to give her any standing whatever in court.

If the plaintiff had set out in a **separate count** the alleged **common-law** cause of action, it would have been **demurrable on its face**, and neither the **trial** court nor **the Court of Appeals of Kentucky could have sustained a recovery under such a petition.** The petition is set out substantially on pages 3 to 5, inclusive, of the brief filed herein by defendant in error. It will likewise be found upon pages 1 to 3, inclusive, of the Printed Record herein. The most casual inspection of said petition will disclose that it attempts to predicate a right of recovery upon the violation of what are known as the Employers' Liability Act of 1908 and the Hours of Service Act of 1907. After referring to both of these statutes, the petition then reads, as follows:

> "That the aforesaid negligent and wrongful acts of the officers and agents of said defendant, and the said violation of the laws of the United States relating to interstate commerce were the proximate and sole causes of the death of her said husband, and she relies on the laws of the United States made and provided in such cases."

It is perfectly manifest that the pleader was not attempting to set out a **common-law** cause of action; otherwise she would not have included the same in a **single count** with the alleged violation of the Federal laws, *supra.* At any rate, it is too clear for argument, that, whether pleaded as a **common-law** cause of action or not, no recovery could be had in this case under a **common-law** proceeding. Hence, as the only remaining

causes of action alleged in the petition relate to the construction of the Employers' Liability Act, and the Hours of Service Act, *supra*, the case clearly comes within the jurisdiction of this Court.

Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 305-6.

In the case last cited, Mr. Justice Day, speaking for this Court, in which all concurred, said:

> "A motion to dismiss the proceedings for want of jurisdiction was made in this court and passed for consideration to the merits. The contention is that inasmuch as the Supreme Court of the State found, as a matter of fact, that the bankruptcy proceedings had been concluded, by denial of the adjudication and an abandonment of the proceedings, that this finding of fact is binding upon this court upon writ of error to the state court, and therefore there is no substantial basis for the writ of error. We are of the opinion that the contention in this respect is not well founded. The defendant below set up a proceeding in a Federal Court as a protection against further prosecution in the state court. It further set up the issuing of an injunction in the Federal court, undertaking to stay proceedings in the state court. Thereby the defendant claimed the benefit of a Federal right, which brought the case within Article 709 of the Revised Statutes of the United States. The denial of a right claimed under the judgment of a court of the United States lays the foundation for a review in this court. Pittsburgh, Etc., Railway Co. v. Loan & Trust Co., 172 U. S. 493; Deposit Bank v. Frankfort, 191 U. S. 499.
>
> "The alleged finding of fact that the jurisdiction of the Federal court had ended cannot conclude this court in reviewing a question of this

character. The defendant asserted the power and jurisdiction of the Federal court invoked before the beginning of the state proceedings, and alleged its sufficiency to protect it against further proceedings in the state court. The right of ultimate determination of a contention of that character in this court cannot be defeated by the finding of the state court that the Federal court had exceeded or ended its jurisdiction. The determination of a question of that kind is not a finding upon a disputed question of fact, nor within that class of cases in which this court has repeatedly held that the facts as found in the state court would be regarded as conclusive here. Moreover, the case involved a construction of the Bankruptcy Act. As the plaintiff in error contended that the proper construction of the act would defeat the jurisdiction of the state court, the adverse ruling gave this court jurisdiction. Rector v. Bank, 200 U. S. 405."

We insist, therefore, that this court, regardless of the views of the Kentucky Court of Appeals, should hold that there is no **common-law** cause of action involved in this litigation, and that this Court has **jurisdiction** of the case.

(*a*) Even if it were possible to conceive of a **common-law** cause of action in a death case, the petition in respect to the alleged negligence of the engineer would signally fail to state any cause of action. It simply pleads **legal conclusions**, and does not attempt to set out any of the **substantive facts which would be necessary to establish a right of recovery.** The mere statement of **legal conclusions** is neither good as a **common-law pleading, nor under the Federal Statutes involved in this litigation.**

Willard v. Zehr, 215 Ill. 148; s. c. 74 N. E. 107;
Schueler *et al.* v. Mueller, 61 N. E. 1044 (Ills.);

Southern Ry. Co. v. King, 217 U. S. 536-7, *l. c.*;
Sargent v. Baublis, 215 Ills. 428; s. c. 74 N. E. 455;
Paganes v. City of Chicago, 111 Ill. App. 590;
Pier *et al.* v. Heinrichoffen *et al.*, 52 Mo., *l. c.* 335-6;
Sidway v. M. L. & L. S. Co., 163 Mo. 372-5;
Mallinckrodt Chem. Wks. v. Nemnich, 169 Mo. 395 *et seq.*;
Gibson v. Railway Co., 225 Mo. 481-483, inc.;
Louisville Canal Co. v. Murphy, 9 Bush 522 (Ky.);
Stivers v. Baker *et al.*, 87 Ky. 508; s. c. 9 S. W. 491-2;
Clark v. Dillon, 97 N. Y. 370;
Sec. 4 Carroll's Kentucky Code (1906 Rev.), p. 18.

Sec. 4 of Carroll's Kentucky Code (1906 Rev.), p. 18, reads as follows:

> "Forms of Action. There shall be but one form of action."

On page 18 of the Code aforesaid will be found the following:

> "Forms, not substance abolished by Code; and the pleader must state in ordinary and concise language the facts constituting the cause of action. Every fact necessary to enable the plaintiff to recover must be alleged, and every essential allegation required to make a declaration good at common law upon demurrer must be made. The facts must be alleged so as to enable the opposite party to know what is meant to be proved, and also that an issue may be formed in regard to the subject-matter in dispute and to enable the Court to pronounce the law upon the facts stated. Louisville

Canal Company v. Murphy, 9 Bush (Ky.) 522; Stivers v. Baker, 87 Ky. 508 (9 S. W. 491-2), 10 R. 523; Murphy v. Estes, 6 Bush 532; Huffaker v. Nat. Bk., 12 Bush 287."

In

Louisville & Portland Canal Co. v. Murphy, Admr., Etc., 9 Bush 527, l. c.,

Judge Pryor, speaking for the Kentucky Court of Appeals, said:

> "The Code of Practice requires the pleader to state in ordinary and concise language the facts constituting the cause of action; and while the ancient forms of pleading are abolished, by its provision, still every fact necessary to enable the plaintiff in the action to recover must be alleged, and every essential averment required to make a declaration good at common law upon general demurrer must be made in the petition under our present system of pleading. The facts must be alleged, so as to enable the opposite party to know what is meant to be proved, and also that an issue may be formed in regard to the subject-matter of dispute, and to enable the Court to pronounce the law upon the facts stated. (1 Chitty's Pleadings, 213.)"

The quotations above made are very clear and explicit as to what the petition shall contain. Tested by said quotations, the declaration in the case at bar utterly fails to comply with the requirements of the Code in any respect. **When divested of all unnecessary language, the petition under consideration simply states that the engineer in charge of the train ran over and killed plaintiff's intestate at the time and place of acci-**

dent. Not a single issuable fact is presented either in the original or in the amended petition.

Section 1727 of the Revised Statutes of Missouri, 1909, under the title of "Forms of Action and Parties Thereto", provides that:

> "There shall be in this State but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be demoninated a civil action."

Section 1794, Revised Statutes of Missouri, 1909, provides that the petition shall contain:

> "First, the title of the cause. * * * Second, a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition."

In

Pier v. Heinrichoffen, 52 Mo. 335-6, l. c.,

it is said:

> "As the vice of the old system of pleadings was its prolixity, its general averments, and general issues, and the delay and expense inseparable from it, the new system (or the modifications of the old) which we have adopted has little claim to be considered a reform, unless it avoids such defects and furnishes rules, by which the great object of all pleadings is better attained, namely, to arrive at a material, certain and single issue. Hence, the great improvement of our Code consists in requiring the pleadings to contain a plain and concise statement of the facts, constituting a cause of action, or matter of defense (2 W. S. 1013, Sec. 3; and 1015, Sec. 3). Facts, and not evidence, nor con-

clusions of law, must be distinctly stated. Every fact, which the plaintiff must prove to maintain his suit, is constitutive in the sense of the Code, and must be alleged."

The foregoing quotation is in full accord with that made from the Kentucky decision, *supra*, and is sustained by all of the other authorities cited.

In

Gibson v. Railway Company, 225 Mo. 482-3, l. c.,

the Supreme Court of Missouri, in discussing the question under consideration, said:

"Plaintiff states that under and by virtue of sections 3313 and 3443 of the Code of Iowa actions for damages for the death of Martin M. Welch, survived to plaintiff as administrator, and under and by virtue of said sections, plaintiff is authorized and empowered to sue and recover damages caused by the death of Martin M. Welch against defendant on account of the carelessness and negligence of defendant, which resulted in the death of Martin M. Welch, as hereinafter alleged.

"These allegations are in no sense statements of facts, but are clearly conclusions of law drawn by the pleader; and, in passing upon the demurrer, they should be eliminated from the petition, for the reason that they are neither traversable nor demurrable.

"In passing upon a similar question, this court, in the case of Mallinckrodt v. Nemnich, 169 Mo., *l. c.* 397, used this language: 'The allegation quoted is simply the averment of a legal conclusion; not the statement of issuable facts; not, therefore, either traversable or demurrable, and is to be treated as no statement at all, and consequently obnoxious to attack by general demurrer (Bliss

Code Plead. [3 Ed.], Sec. 413, and note; *Ib.*, Secs. 210, 211, 213; Craft v. Thompson, 51 N. H., *l. c.* 540; McKenzie v. Mathews, 59 Mo., *l. c.* 102; Cooper v. French, 52 Iowa 531). 'The allegation of a conclusion of law raises no issue, need not be denied, and its truth is not admitted by a demurrer to the complaint containing it.' (Kittinger v. Buffalo Traction Co., 54 N. E. 1081; see also 12 Ency. Pl. and Prac. 1022 *et seq.;* Institute v. Bitter, 87 N. Y. 250; Hoester v. Sammelmann, 101 Mo., *l. c.* 624).

"To the same effect are Hand v. St. Louis, 158 Mo., *l. c.* 212, 213; State *ex rel.* v. Aloe, 152 Mo. 466; Martin v. Castle, 193 Mo. 183."

In

Southern Ry. Co. v. King, 217 U. S. 536, l. c.,

this Court, speaking through Mr. Justice Day, said:

"The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution, and a direct burden upon, and impedes interstate traffic and impairs the usefulness of defendant's facilities for that purpose; that it is impossible to observe the statute in carrying mails and in interstate commerce business. But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional. They do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful operation. For aught that appears as allegations of fact in this answer the crossing at which this injury happened may have been so located and of so dangerous a character as to make the slackening of trains at that point necessary to the safety of those using the public highway, and a statute making such re-

quirement only a reasonable police regulation, and not an unlawful attempt to regulate or hinder interstate commerce. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense and that the demurrer thereto was properly sustained."

The rule announced in the foregoing quotation from the Supreme Court of the United States applies to petitions as well as answers, and discloses that this Court, in construing Federal statutes like the one under consideration here, requires the pleadings to state **facts**, and not **conclusions** of law. Tested by this authority, the original and amended petitions in the case at bar, in our opinion, fail to state any cause of action whatever.

In

Willard v. Zehr, 74 N. E. 109, l. c.,

the Supreme Court of Illinois said:

"We concede that it is never necessary for a party to plead the evidence of facts averred, but enough of the facts themselves relied upon as sustaining the cause of action or defense must be alleged to enable the Court to determine their sufficiency. It is also urged that the objections to the plea could only be raised by special demurrer, and that the particular grounds assigned were insufficient. The objections above pointed out go to the substance of the plea, and certainly could be reached by general demurrer. In fact, the general rule is that all objections to pleas of this kind, whether of form or substance, can be raised by a general demurrer. Finch v. Galigher, 181 Ills. 625; 54 N. E. 611.

The Circuit Court did not err in sustaining the plaintiff's demurrer to the plea, and the Appellate Court properly affirmed the judgment."

Numerous other authorities can be found sustaining the principles announced in the foregoing quotations. The petition, as well as the amendment thereto, is wholly insufficient under the laws of the **United States** relied upon as a basis of recovery in this action; under the laws of **Illinois, where the accident occurred**; under the laws of the State of **Missouri, where the defendant,** in contemplation of law, **resides**; and under the rule announced in the Code and authorities of the State of **Kentucky where this action was brought.**

It cannot be said in this case that the complaint is good after verdict, unless the Court intends to hold that the mere statement of **legal conclusions,** without any issue of fact being tendered, will constitute **a good cause of action after verdict.** We know of no court which has gone to the extent of sustaining a petition under such circumstances, when assailed for insufficiency at **any** stage of the proceedings. We insist, therefore, that no cause of action has been stated, and that by reason thereof the judgment below should be reversed.

No cause of action, as heretofore shown, could have been stated under the **common law**; nor does the record show that one was **attempted** to be stated within the purview of the rules of pleading above set out. The judgment of the trial court therefore, could not have been legally sustained by the Court of Appeals under a **common-law** proceeding, and hence, **if any right of action exists at all,** it must be under the **Federal statutes** as pleaded in the petition, the consideration of which would confer jurisdiction upon this court.

(*b*) Even if a **common-law** cause of action in respect to the alleged negligence of the engineer existed, and even if the same had been **properly pleaded,** the **undisputed testimony** produced by the plaintiff at the trial (as shown upon pages 64 to 70, inclusive, of the Record), **clearly discloses an utter failure of any substantial proof of negligence on part of the engineer.** In view of the foregoing evidence, no right of recovery could have been legally sustained by the Court of Appeals under a **common-law** procedure, and hence the administratrix must recover under the Federal statutes, if at all.

(*c*) The petition, as well as the Record, discloses that the deceased was a brakeman (sometimes called a flagman), and was at his post of duty in the engine cab with the engineer when they pulled into Wolf Lake on the morning of McWhirter's death. The deceased and the engineer were **fellow servants** at the time and place of accident. Under the common law no right of action could have existed in behalf of one servant against the principal, based on the negligence of a co-servant.

> Beutler, Admr., v. Grand Trunk Junction Ry. Co. *et al.*, Vol. 32, No. 11, Supreme Court Reporter, p. 402.

Unless the plaintiff had a right of action based on the alleged violation of the **Federal** statutes, *supra*, she had no cause of action at all, and could not successfully have maintained a **common-law** cause of action based on the alleged personal negligence of the engineer in running over and killing her intestate at the time and place of accident. Hence this Court would have jurisdiction, as the remainder of the alleged cause

of action relates solely to the construction of the Federal acts, *supra*.

(*d*) In order to deprive this Court of jurisdiction, it is contended by the defendant in error that her petition, as amended, is based upon the **two Federal statutes and the common law**, although the facts are pleaded in a **single count** in the petition. The trial court turned the jury loose to convict the defendant upon **any** or **all** of the grounds contained in the petition. From the instructions given at the instance of the plaintiff (Printed Record, pp. 17 and 18) it would be impossible to determine whether the jury **ignored the evidence**, in respect to the alleged negligence of the engineer, and returned a verdict on the so-called **common-law** cause of action, **or** whether they convicted defendant of a violation of the **sixteen-hour law**, and returned a verdict accordingly. We do not see **how**, in a case of this character, where the pleader has **attempted** to state **several distinct causes of action in one count** and the jury are authorized, as in this case, to return a general verdict, **it could be determined from the record whether the verdict was based upon the alleged common-law cause of action, or that in respect to the alleged violation of the Federal statutes.** We do know, however, that the Court of Appeals, as well as the trial court, held that the plaintiff was entitled to recover on account of the alleged violation of the **Federal** statutes; while, on the **other** hand, we have demonstrated that **there was no common-law cause of action which could have been asserted in the case.** Therefore, it seems to us that the jurisdiction of this Court is **conclusive**, and that by reason thereof the motion to dismiss should be overruled.

II.

On page one of the brief of defendant in error the second ground on which it is urged that the writ of error should be dismissed is stated as follows:

> "**Second.** The plaintiff in error admits by both its pleadings and evidence that McWhirter was killed by its train while he was going out in front of the engine to throw the switch, 'as it was his duty to do', and while in the performance of his duty. And the defendant (plaintiff in error) having admitted that McWhirter was killed while in the performance of his duty and while going out in front of the engine to throw a switch, as it was his duty to do, and the engineer having admitted that he knew of the presence of McWhirter in front of the engine and that he maintained no lookout for him, this constituted evidence of negligence and it was properly submitted to the jury, and for that reason the appeal should be dismissed."

Defendant, in its answer (Printed Record, pp. 7 and 8), among other things pleaded the following:

> "The defendant, further answering, says: Etwal McWhirter was killed February 23, 1910, at 7:25 a. m. at Wolf Lake, Illinois; that he was a flagman on a freight train which was going in at Wolf Lake, a station on defendant's road, to tie up, with Conductor Cooper in charge on an extra 503 going south; that while going in on a siding at Wolf Lake, Illinois, Etwal McWhirter, while acting as flagman, went down on the running board on the left side of the engine; went down on the pilot and on to the ground to run ahead to throw the switch, as it was his duty to do, to head in at Wolf Lake, and while running or starting to run,

he stumbled or slipped and fell just in front of the engine, and the engine passed over him killing him at the time. That the killing was an accident and was unavoidable.

And defendant denies that by reason of any negligence or carelessness on the part of the engineer in charge of said engine, or of any officers, agents or servants of the defendant, Etwal McWhirter lost his life, etc."

It will be observed that this pleading simply avers **that it was the duty of deceased to go forward and throw the switch, but it does not state that he was authorized to pass between the rails in front of a moving locomotive while performing said work.**

But the authorities cited under the foregoing proposition conclusively dispose of this second contention on the part of defendant in error. We have heretofore demonstrated that the alleged personal negligence of the engineer at the time and place of accident could not confer a **common-law** cause of action upon the administratrix in Kentucky for the death of her husband. If she has any cause whatever, it must be under the Federal statutes pleaded in the petition.

We likewise call attention to the printed record, pages 64 and following, where the testimony shows conclusively **that the engineer was not aware of the presence of the deceased in front of his locomotive, and never saw him from the time he left the engine cab until after he was killed. These facts were brought out by the plaintiff, who produced the engineer as a witness, and the foregoing testimony elicited from plaintiff's own examination.** We therefore **deny** the statement made in the above proposition, to the effect that the engineer admitted that he **knew** deceased

was in front of his engine, and likewise insist that, whether such statement be true or false, it conferred no common-law cause of action upon the plaintiff. Neither does it deprive this Court of jurisdiction to hear and determine the cause.

III.

On pages one and two of her brief defendant in error assigns as a **third** ground for the dismissal of the writ of error the following:

> "**Third.** Neither this Court nor the Court of Appeals of Kentucky was authorized by the pleadings to consider the contributory negligence, if any, of McWhirter, because the plaintiff in error did not plead contributory negligence in any form; and furthermore, both contributory negligence and assumption of risk as defenses are barred by the Federal Employers' Liability Act of 1908. And this Court is also without jurisdiction to consider whether the negligence of the engineer was the proximate cause of the death of McWhirter, because the lower court decided that the negligence of the engineer and the violation of the Hours of Service Act concurred in causing the accident and injury complained of."

Defendant in error in the foregoing proposition contends, first, that neither **this** Court nor **the Court of Appeals of Kentucky** can pass upon the question of the **contributory negligence of deceased**, because it was not pleaded. **Practically all of the testimony in the case is that of the plaintiff, and the facts showing contributory negligence were brought out by the plaintiff either in establishing her own case, or upon the cross-examination of plaintiff's witnesses at the**

trial (Printed Record, pp. 19 and following). While in some jurisdictions contributory negligence constitutes an affirmative defense, and must be pleaded in the answer, yet, **where the facts establishing contributory negligence are disclosed by the plaintiff's own testimony or appear from the cross-examination of plaintiff's witnesses, the defendant is entitled to rely thereon without pleading same.**

Hudson v. Railway Co., 101 Mo., 30 *l. c.*;
Chaney v. Railway Co., 176 Mo. 598.

But whether contributory negligence was properly **pleaded** or considered in the court below is **not material** to the issue here **as to whether or not this Court has jurisdiction of the cause.** In other words, whether **contributory negligence** be considered **in** or **out** of the case, it would not confer upon the plaintiff a **common-law** cause of action, and hence her right to recover, **if at all**, must be under the **Federal statutes** as pleaded.

Again in the third proposition, *supra*, plaintiff avers that both contributory negligence and assumption of risk as defenses are barred by the Federal Employers' Liability Act of 1908. In other words, **she invokes the Federal statute to shut off the defenses of contributory negligence and assumption of risk**, and insists that they are not to be considered in the case on account of the Federal acts, but yet holds that this Court has no jurisdiction to determine the cause.

Said paragraph three further recites that this Court is without jurisdiction to consider whether the negligence of the engineer was the **proximate cause** of the death of McWhirter, for the reason that the lower court decided that the negligence of the engineer and the violation of the Hours of Service Act **concurred in**

causing the accident and the injury complained of. If this statement be true, **that it took the alleged acts of negligence on the part of the engineer and the alleged violation of the sixteen-hour law combined to warrant a recovery, then, of course, this Court would have jurisdiction, as the sixteen-hour statute is invoked and becomes the necessary basis of plaintiff's recovery.** As stated by this Court in

Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 305-6,

this Court can determine for itself whether there was any negligence upon the part of the engineer (Printed Record, pp. 64 and following), and can likewise determine whether the alleged violation of the sixteen-hour law was the **proximate cause** of the death of plaintiff's intestate, or had any **connection** whatever therewith. With reference to this question the Kentucky Court of Appeals said (Printed Record, p. 44):

> "It is, however, proper to say that the negligence of appellant's engineer in the particular mentioned, and that of its conductor or some other servant in control of its transportation department, in keeping appellee's intestate on duty as a brakeman for a longer period than sixteen consecutive hours, concurred in causing his death, and all being servants of appellant, their negligence is chargeable to it. Therefore, the question of proximate cause raised by counsel for appellant can have no part in our consideration of the case."

Plaintiff's petition does not plead that there was any **causal** connection between the **alleged violation of the sixteen-hour law and the death of her intestate.** It

nowhere charges that the latter, by reason of being **overworked five minutes**, had become **exhausted, fatigued** or **unable to perform his ordinary duties.** But the petition proceeds on the theory that, **if the deceased was overworked five minutes, and during the latter period had been struck by lightning, the railway company would have become liable as an insurer.** This was the position taken by the Kentucky Court of Appeals (Printed Record, p. 44), and, by reason thereof, the Court of Appeals declined to consider the authorities relied upon and cited by the railway company on motion for rehearing (Printed Record, pp. 84 and following).

The foregoing matters really relate to the merits of the controversy, and do not go to the jurisdiction of this Court, but as they were presented as a part of the motion of defendant in error, we have deemed it advisable to reply thereto in the manner aforesaid.

IV.

The fourth ground urged by defendant in error for dismissing the writ of error is set out upon page two of her brief, and reads as follows:

> "**Fourth.** This Court cannot consider the failure of the State court to remove this case to the Federal court because the plaintiff in error did not present a transcript of the record in the United States Circuit Court for the Western District of Kentucky, nor did it except to the ruling of the State court in overruling its petition and motion to transfer; and, furthermore, by the Act of July 5, 1910, entitled, 'An Act to amend an act entitled An Act Relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases, Approved April 22nd, 1908', it is provided

> that 'no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States'."

We do not desire to enter into any discussion of this question. The plaintiff in error filed in the Circuit Court of Hickman County, Kentucky, its petition for a removal in due time (Printed Record, pp. 5 and 6); it likewise tendered a good and sufficient bond (Printed Record, p. 6). The accident occurred on the 23d of February, 1910 (Plaintiff's Petition, Printed Record, p. 1), and the amendment to the Employers' Liability Act was not approved until April 5, 1910, long after the plaintiff's right of action had accrued. This amendment of 1910 is relied upon as conferring jurisdiction upon the Circuit Court of Hickman County, Kentucky, over a cause of action which originated in the State of Illinois. The construction of the Federal Employers' Liability Act is therefore involved, and hence this Court would have jurisdiction to consider this case.

In conclusion, we insist that the motion filed by defendant in error to dismiss our writ of error in this cause is absolutely without merit.

As the administratrix, through her counsel, has submitted a brief upon the merits, in addition to discussing the jurisdiction of this Court, we have determined to prepare and submit herewith a full brief upon the merits, as though no motion to dismiss had been filed. We, therefore, pray that the motion to dismiss the writ of error may be overruled.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

MRS. CORDIE McWHIRTER, Administratrix of the Estate of ETWAL McWHIRTER, Deceased,
Defendant in Error.

No. 970.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS AND BRIEF OF PLAINTIFF IN ERROR ON THE MERITS.

Mrs. Cordie McWhirter, her husband and minor children were residents of McCracken County, Kentucky (Printed Record, p. 1). She was appointed administratrix of her husband's estate by the County Court of said county. Her husband was a flagman, or brakeman, on one of defendant's freight trains running from Illmo, Missouri, to Bush, Illinois (Printed Record, p. 19). On the morning of February 23, 1910, her said husband was run over and killed at Wolf Lake, in the State of Illinois, by the train upon which he was

employed as brakeman (Printed Record, p. 20). His wife, as administratrix aforesaid, commenced this action in the Circuit Court of Hickman County, Kentucky, on the 10th day of August, 1910, to recover $25,000 on account of the death of her said husband (Printed Record, pp. 1 to 3, inclusive).

Defendant was served with process in Hickman County aforesaid, and upon a trial before a jury in said county plaintiff obtained a verdict for $3,000 and costs, upon which judgment was duly entered (Printed Record, p. 10). The case was duly appealed to the Kentucky Court of Appeals—said court being the highest appellate court in the State having jurisdiction of the case—where the judgment below was affirmed, as shown by the opinion of said Court (Printed Record, pp. 41 and following). Appellant, in due time, filed its motion for rehearing in said Court of Appeals, and the same was overruled. The case was brought to this court upon writ of error to said Court of Appeals. Defendant in error filed a motion to dismiss the writ of error aforesaid, with brief in support of same. Plaintiff in error filed suggestions and printed brief in opposition to said motion to dismiss writ of error.

Plaintiff's Petition (Printed Record, pp. 1 to 3, inc.).

The original petition on file herein reads as follows:

"Mrs. Cordie McWhirter, Administratrix of the Estate of Etwal McWhirter, Deceased.
Plaintiff,
vs.
St. Louis, Iron Mountain and Southern Railroad Company,
Defendant.

Be it Remembered, that heretofore, on August 10, 1910, the plaintiff, by attorney, filed her petition herein, which is in words and figures as follows, to-wit:

'The plaintiff, Mrs. Cordie McWhirter, administratrix of the estate of Etwal McWhirter, deceased, says that heretofore, to-wit, on the 23rd day of February, 1910, Etwal McWhirter departed this life intestate, domiciled in and a resident of McCracken County, Kentucky; that the said Etwal McWhirter, deceased, left surviving him his widow, this plaintiff, and four infant children, to-wit, Zay McWhirter, aged twelve; Zelma McWhirter, aged ten; Leota McWhirter aged seven, and Edward McWhirter, aged five, for whose benefit the action hereinafter set out is brought by this plaintiff as administratrix of the estate of the said Etwal McWhirter, deceased, that at the time of the death of the aforesaid intestate, he was a resident and citizen of McCracken County, Kentucky, and that his widow, this plaintiff, was at the time of his death and is now a resident of McCracken County, Kentucky, and that on the ... day of July, 1910, she was duly appointed and qualified as administratrix of the estate of Etwal McWhirter, deceased, by the County Court of McCracken County, Kentucky, which court was the

court having competent jurisdiction to appoint an administratrix of the aforesaid estate; that she immediately entered upon the discharge of her duties as said administratrix, and has been since said time, and is now duly appointed, qualified and acting administratrix of the estate of Etwal McWhirter, deceased. Attested copies of her appointment and qualification as administratrix are filed herewith and made a part hereof, and marked Exhibit "A".

Plaintiff further says that the St. Louis, Iron Mountain and Southern Railway Company is a corporation created by and existing under the laws of the State of Missouri, with its principal place of business in St. Louis, Missouri, having authority to sue and be sued in its corporate name aforesaid, St. Louis, Iron Mountain & Southern Railway Company; that the said defendant is authorized to, and does business as a common carrier by railroad, both of passengers and freight in Missouri and other States; that the said defendant is engaged in the business of a common carrier in the State of Kentucky, and has its principal office and place of business in the State of Kentucky at Columbus, in Hickman County, Kentucky.

Plaintiff now says that at the time of the death of the said Etwal McWhirter, deceased, he was employed by and in the service of the St. Louis, Iron Mountain & Southern Railway Company, defendant herein, in the capacity of **flagman**; that the death of the said Etwal McWhirter resulted from the wrongful acts of the conductor and engineer in charge of the train and locomotive on which the said Etwal McWhirter, deceased, was at the time of his death employed and acting as flagman, as aforesaid, and by the negligence and wrongful acts of the train dispatcher and higher officials, who had control and authority over this

plaintiff's intestate, of the defendant, St. Louis, Iron Mountain & Southern Railway Company; that the said Etwal McWhirter was killed while so acting as flagman, and at a time he was employed by the St. Louis, Iron Mountain & Southern Railway Company by being run over and crushed and mangled by the train and locomotive of the said defendant herein; that at the time of the said accidental death of the aforesaid Etwal McWhirter, the train and locomotive on which he was so employed and on which he was acting in the capacity of flagman for the defendant herein, was engaged in the transportation of freight between the States of Missouri and Illinois, and that the said train and locomotive aforesaid was an interstate train and was engaged in interstate commerce between the aforesaid States of Missouri and Illinois.

Plaintiff further says that her cause of action herein arose against the defendant by reason of the wrongful and negligent death of her aforesaid husband, Etwal McWhirter, which was occasioned by the negligent and wrongful acts of the officers and agents of the defendant, as aforesaid, in managing and operating its train, while her husband was employed by the defendant, St. Louis, Iron Mountain & Southern Railway Company, as flagman on a train and locomotive engaged in interstate commerce as aforesaid; that her said husband had been permitted and required by the officers and agents of the defendant to be and remain on duty for a longer period than sixteen consecutive hours next before the aforesaid accident, and in violation of Chapter 29-39, Section 2, 34 Statute 1416, of the Acts of Congress of the United States relating to interstate commerce, and being a part of an act entitled "An Act to Promote the Safety of Employes and Travelers Upon Railroads by

Limiting the Hours of Service of Employes Thereon", which became a law on the 4th day of March, 1907, and also an act entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases", which became a law on the 22nd day of April, 1908; and that the aforesaid negligent and wrongful acts of the officers and agents of the said defendant, and the said violation of the laws of the United States relating to interstate commerce were the proximate and sole causes of the death of her said husband, and she relies on the laws of the United States made and provided in such cases.

Plaintiff now says that the said Etwal McWhirter, deceased, was a young and able-bodied man, aged thirty-four years, and that his expectancy of life was, at the time of his death, more than twenty-eight years; that he was capable of earning $100.00 per month, and that at the time of his death he was capable of, and was earning a living for this plaintiff and his aforesaid infant children, and was their sole and only support, and that by reason of the wrongful and negligent acts of the defendant, and its officers and agents, and the aforesaid violations of law, as set out above, which acts and violations of law resulted in the death of the said Etwal McWhirter, she has been damaged in the sum of $25,000, and is now entitled to recover of the defendant the aforesaid sum of $25,000.

Wherefore, plaintiff prays for a judgment against the defendant for the sum of $25,000, for her costs herein expended, and for all proper orders and relief.

EATON & BOYD,
Att'ys for Pl'ff.'"

DEFENDANT'S PETITION AND BOND FOR REMOVAL.

Defendant was served with process on August 10, 1910, and on the same day filed in the Circuit Court of Hickman County aforesaid a petition in due form asking that said cause be transferred to the United States District Court at Paducah, Kentucky, upon the ground of diverse citizenship, the plaintiff being a resident of Kentucky and the defendant a Missouri corporation. A good and sufficient bond was likewise at the same time tendered and approved by the Court. The application for removal was overruled, and an exception duly saved by defendant to the action of the Court in overruling same (Printed Record, pp. 5 to 7, inc.)

DEFENDANT'S ANSWER.

(Printed Record, pp. 7 and 8.)

Defendant's answer, omitting caption, reads as follows:

> "Now comes the defendant, St. Louis, Iron Mountain & Southern Railway Company, and for answer to the petition of the plaintiff, Mrs. Cordie McWhorter, administratrix of the estate of Etwal McWhorter, deceased, says:
>
> That it admits that, at the time of the death of Etwal McWhorter, he was in the employ of the defendant in the capacity of flagman; but it denies that the death of Etwal McWhorter resulted from the wrongful acts of the conductor and engineer in charge of the train and locomotive on which the said Etwal McWhorter was at the time of his death employed, and acting as flagman. And denies that by reason of the negligence and wrongful acts of the train dispatcher and higher officials, who had control and authority over Et-

wal McWhorter, he came to his death. And denies that the death of Etwal McWhorter was occasioned by the negligent and wrongful acts of the officers and agents of the defendant in managing and operating its train, while the said Etwal McWhorter was employed by the defendant, St. Louis, Iron Mountain & Southern Railway Company, on a train and locomotive engaged in interstate commerce.

And defendant denies that Etwal McWhorter had been permitted and required by the officers and agents of the defendant to be and remain on duty for a longer period of time than sixteen consecutive hours next before the aforesaid accident, and in violation of chapter 29-39, section 234, Statute 14-16, of the Acts of Congress of the United States relating to Interstate Commerce, and being a part of an act entitled:

'An act to promote the safety of employes and travelers upon railroads by limiting the hours of service of the employes thereof.'

Which became a law on the 4th day of March, 1907. And also an act entitled:

'An act relating to the liability of common carriers by railroad to their employes in certain cases.'

Which became a law on the 22nd day of April, 1908.

And defendant denies that the violation of the laws of the United States relating to interstate commerce was the proximate and sole cause of the death of said Etwal McWhorter.

The defendant, further answering, says: Etwal McWhorter was killed February 23, 1910, at 7:25 a. m. at Wolf Lake, Illinois; that he was a flagman on a freight train which was going in at Wolf Lake, a station on defendant's road, to tie up, with Conductor Cooper in charge on an extra

503 going south; that while going in on a siding at Wolf Lake, Illinois, Etwal McWhorter, while acting as flagman, went out on the running board on the left side of the engine; went down on the pilot and on to the ground to run ahead to throw the switch, as it was his duty to do to head in at Wolf Lake; and, while running or starting to run, he stumbled or slipped and fell just in front of the engine, and the engine passed over him, killing him at the time. That the killing was an accident and was unavoidable.

And defendant denies that by reason of any negligence or carelessness on the part of the engineer in charge of said engine, or of any officers, agents or servants of the defendant, Etwal McWhorter lost his life. It denies plaintiff's right to recover in the action the sum of twenty-five thousand dollars as damages, or any other sum.

And now having answered, it prays to be dismissed with its costs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
By E. T. BULLOCK, *Att'y.*"

PLAINTIFF'S REPLY.

(Printed Record, p. 8.)

Plaintiff's reply, omitting caption, reads as follows:

"Comes the plaintiff, and for reply to the answer of the defendant herein, says it is true, and she admits that her decedent, Etwal McWhirter, was killed on February 23rd, 1910, at Wolf Lake, Illinois; but she denies that said killing occurred at 7:25 a. m., as alleged in the answer. She admits that the said Etwal McWhirter was a flagman on a freight train which was going in at Wolf Lake, a station on defendant's road; but she denies that Conductor Cooper was in charge

of said train. She admits that said train was known as extra 503 going south, and she admits that while acting as flagman, and in the performance of his duties as such flagman, that the decedent, Etwal McWhirter, was run over and killed by said engine at the time alleged in the petition, and she denies that said killing was an unavoidable accident. She says that she has no knowledge or information sufficient to form a belief as to whether or not the said decedent while running or starting to run stumbled or slipped or fell just in front of the engine, or that by reason of such stumbling, slipping and falling the engine passed over him, thus killing him.

Wherefore, the plaintiff prays as in her petition.

EATON & BOYD,
Att'ys for Plaintiff."

DEFENDANT'S AMENDMENT TO ORIGINAL ANSWER.

(Printed Record, p. 9.)

On February 7, 1911, defendant filed an amendment to its original answer as follows:

"Now comes the defendant, St. Louis, Iron Mountain and Southern Railway Company, and amends its original answer herein and says that Edward McWhirter entered the service of the defendant as brakeman, or made his application for such employment on the 27th day of Jan., 1910, and that when he so entered the service of the defendant as brakeman he well knew the hazard of his employment, and accepted the said employment with the express understanding, contract and agreement that he assumed all risks of said employment as to accidents incident to said employment. The original of said contract will

be filed herewith marked Exhibit B, and is referred to as evidence and asked to be read as such.

Wherefore, defendant prays as in its original answer.

PLAINTIFF'S AMENDED PETITION AND REPLY TO SAID AMENDED ANSWER.

(Printed Record, pp. 9 and 10.)

On February 7, 1911, plaintiff filed an amended petition and reply to defendant's amended answer, which, without caption, reads as follows:

"Now comes the plaintiff and begs leave of the Court to file this her amended petition, and for cause, says that by mistake and oversight it was alleged that the death of her husband, Etwal McWhirter, was occasioned by the wrongful acts of the conductor and engineer in charge of the train on which her said deceased was employed at the time of his death; but she now says that said death was occasioned by the wrongful and **negligent** acts of the said conductor and engineer in charge of the train and locomotive on which the said Etwal McWhirter, deceased, was employed at the time of his death, and as alleged in the original petition.

Wherefore, she prays as in her original petition.

EATON & BOYD,
Att'ys for Plaintiff."

Said amended petition is endorsed on the back thereof as follows, to-wit: "Filed in open Court, Feby. 7, 1911. Jno. R. Kemp, Clk. By T. McMasters, D. C."

"Now comes the plaintiff, Mrs. Cordie McWhirter, administratrix of the estate of Etwald McWhirter, deceased, and for reply to the amended answer filed herein, admits that the said Et-

wald McWhirter, deceased, entered the service of the defendant as brakeman about the 27th day of January, 1910; but she denies that he accepted the employment with the express understanding, contract and agreement that he assumed all risk of his said employment as to any accidents incident to same.

Wherefore, she prays as in her original petition.

EATON & BOYD,
Att'ys for Plaintiff."

TRIAL AND EVIDENCE.

The trial of this cause (Printed Record, p. 10) was commenced on the 8th of February, 1911. The evidence upon part of plaintiff is set out in full upon pages 19 to 28, inclusive, of Printed Record, and also upon pages 35 to 36, inclusive, of Printed Record. The defendant's evidence is set out upon pages 37 to 38, inclusive, of Printed Record.

The plaintiff at the trial introduced in evidence the testimony of **H. O. Guess,** the **locomotive engineer** in charge of the train which ran over plaintiff's intestate (Printed Record, pp. 19 and following); also the testimony of F. A. Roberson, the **telegraph operator** at Wolf Lake, who witnessed the accident (Printed Record, pp. 23 and following); and the testimony of **G. C. Loper,** the **conductor** in charge of the train (Printed Record, pp. 25 and following).

Engineer Guess and Operator Roberson were the **only** witnesses who knew anything of the **actual** facts connected with the killing of plaintiff's intestate. The conductor was in his caboose at the time. After setting out a general outline of the facts, we will print in detail the testimony of the **eye-witnesses** as to what occurred at the time and place of accident.

It appears from the testimony of **H. O. Guess** that he had been an **engineer** in the employ of the defendant for about three years, and prior thereto had been a fireman; that on the 22d of February, 1910, he was called out as engineer on a freight train to go from Illmo, Missouri, to Bush, Illinois, for coal. The deceased brakeman, McWhirter, was a member of his crew. They left Illmo at **3:30 p. m. on the 22nd of February, 1910** (Printed Record, p. 19), with a freight train composed of nine empty freight cars. They remained at Bush about **an hour** and started back to Illmo, Missouri, with a few cars of coal (Printed Record, p. 20). On their return trip they arrived at Wolf Lake about 7:35 a. m. on the 23d of February, 1910. Witness Guess then describes what took place at the time of the death of plaintiff's husband as follows (Printed Record, pp. 20 and 21):

> Q. 21. Just detail the manner as it occurred, as you know it.
>
> A. 21. As I came into Wolf Lake, when I whistled for town, brakeman asked me if I were going to head in at Wolf Lake. I told him yes, that we had to get in on account of the sixteen-hour law. He got up, went out at the front window on the left side of the engine along the footboard, and the next thing I seen was the operator at Wolf Lake very much excited in giving a stop signal. I stepped off of engine, asked him what was the matter. He said, "My goodness, you have run over the brakeman." I went looking for him, found him under the left tank wheel, cut in two.
>
> Q. 22. The brakeman referred to here was whom?
>
> A. 22. McWhirter.

Q. 23. How was your train known, by what name?

A. 23. Extra South 503.

Q. 24. Did you know this brakeman was in front of the engine?

A. 24. No, sir.

Q. 25. Did you see him go out of the cab window?

A. 25. I seen him go out of the cab window. That is all.

Q. 26. What did you suppose he went out of the cab window for?

A. 26. He is supposed to get out there to open the switch. I suppose that is what he went out there for.

Q. 27. Was it his duty to throw the switch in front of the window or not?

A. 27. No, sir, it wasn't his place to throw it in front of the window. He wasn't supposed to go out on that pilot.

Q. 28. What I mean is was the switch that the brakeman was required to throw in front of the engine or behind of the engine?

A. 28. It was in front of the engine.

Q. 29. Have you any record that would show the minute that the train arrived at Wolf Lake on the morning of the 23d?

A. 29. No, sir, I have no record at all.

Q. 30. You testified before the coroner's jury, did you not?

A. 30. Yes, sir.

Q. 31. Do you remember what time you stated at the Coroner's inquest that the train arrived at Wolf Lake?

A. 31. As near as I can remember, it was 7:35.

Q. 32. 7:35 would make you how long over the sixteen-hour law?

A. 32. Five minutes.

Q. 33. You stated before the Coroner's inquest "at 7:30 the sixteen-hour law was up. We were seven minutes over time." Was that correct?

A. 33. I suppose so. As near as I can remember it was five minutes. It was 7:35. If I said 7:37 that was correct. Then I knew it. It has been over a year ago now.

Q. 34. Which cylinder on your engine was leaking steam?

A. 34. Neither one of them bad, more than ordinarily. It wouldn't make any difference in this case.

Q. 35. But one of the cylinders on your engine was leaking steam, was it not?

A.35. It was not.

Q. 36. Do you mean that neither cylinder on engine 503 were leaking steam on the morning of the 23d of February, 1910, and at the time Etwal McWhirter was killed?

A. 36. I mean they were not. I was not working steam when he was killed. The engine was drifting. Understand, shut off, there would be no leak there.

Q. 37. And neither cylinder had been leaking steam that morning?

A. 37. No.

Q. 38. Had anything been the matter with the engine on this return trip?

A. 38. No, nothing at all.

Q. 39. Who saw this man run over?

A. 39. Mr. Roberson was the only man I can say. He was standing on the platform.

Q. 40. Mr. Fred Roberson?

A. 40. Yes, sir.

Q. 41. Where was this train going to at the time McWhirter was killed?

A. 41. It was going out to Wolf Lake. Destination was Elmo.

Q. 42. When did the train proceed on the balance of its trip?

A. 42. When there was another crew that come to relieve us at Wolf Lake.

Q. 43. The same crew did not proceed?

A. 43. No, sir.

(It will be observed that the engineer testified on behalf of plaintiff, in unequivocal terms, **that he did not know deceased was in front of the engine, and that he never saw the deceased alive any more after he left the engine cab.** He likewise testified, as shown by the foregoing, that it was not the duty of the brakeman to throw the switch in front of the window, and **that he was not supposed to go out on the pilot.** No testimony contradictory of the above was brought out by the plaintiff. The **plaintiff** had taken the **deposition** of witness **Guess**, and could not have been misled by the foregoing testimony, as the deposition was on file in the cause.)

F. A. Roberson, telegraph operator (Printed Record, p. 23), testified on behalf of plaintiff that he saw the train approaching Wolf Lake, and that it arrived at said station about 7:37 a. m. on the morning of the 23d of February, 1910. With respect to what occurred at the time and place of accident, he testified as follows (Printed Record, pp. 23 to 24, inclusive):

Q. 8. Just tell what you know about the accident that happened at Wolf Lake on that morning.

A. 8. As I was sweeping out the office I heard an engine coming. I looked out of the window and saw it was an extra south—saw it was a train coming south—didn't know it was an extra. I seen they were stopping and I wondered what they

were stopping for and went ahead sweeping. When they came in closer to the office I went out and was standing on the platform. **I saw a man leave the cab window and come down the left running board and came down to the pilot, and as it was nearing the switch he left the pilot and struck the ground running and the next I saw he fell face downward between the rails.** I next saw him on his hands and knees. After that I turned my eyes to the engineer and did not see him any more, giving the engineer a stop signal. When he came to a stop I told the engineer something, but I do not remember what I told him, but that was the last I saw of the brakeman until he was taken from under the tender of the engine.

Q. 9. Was this brakeman McWhirter?

A. 9. A far as I know.

Q. 10. It was the brakeman on extra 503?

A. 10. It was the brakeman on extra 503; yes, sir.

Q. 11. **Was he dead when he was taken out from under the engine?**

A. 11. **Yes, sir.**

Q. 12. What kind of weather was this, Mr. Roberson?

A. 12. Pretty cold—weather chilly, cold.

Q. 13. Ground frozen?

A. 13. As well as I can remember, it was.

Q. 14. Any ice and sleet on the ground?

A. 14. Not that I remember.

Q. 15. Do you know how come this man to fall?

A. 15. I do not.

Q. 16. What was the condition of the road be there where he was?

A. 16. There was cinders between the rails.

Q. 17. Wasn't there a pile of ashes or cinders piled up between the rails much higher than the other ground about the place he was killed?

A. 17. Little higher, yes, sir; ashes between the rails.

Q. 18. That was frozen?

A. 18. Yes, sir; I believe they were.

Q. 19. To refresh your recollection, Mr. Roberson, I will ask you if it was not a fact that it had been raining on the night of the 22d which had turned to a kind of sleet and had frozen up?

A. 19. Not that I recollect, because I didn't go to work until one o'clock of the 23d. I don't know whether it rained the night of the 22d, not that I remember of it raining.

Q. 20. What time did this train proceed from Wolf Lake?

A. 20. I do not remember; I was off duty at ten o'clock.

Q. 21. Did anyone else see McWhirter at the time he was killed?

A. 21. I think not. Not at the office.

Q. 22. Was there anyone else around there except the train crew on this freight train?

A. 23. Not at the present time.

Cross-Examination, by Judge E. T. Bullock, Counsel for Defendant.

Q. 1. When you saw McWhirter's perilous condition you say you turned your head. Why did you do that?

A. 1. I don't remember saying I turned my head. I turned my eyes from the brakeman to the engineer.

Q. 2. Did you know then that he was in a condition to being hurt?

A. 2. I didn't positively know so, but I thought he was in a dangerous condition down there.

Q. 3. How far did the train run before the engineer stopped it after you notified him of this trouble?

A. 3. I suppose about the length of an engine. Maybe not quite so far, maybe a little further. I don't remember.

Q. 4. Do I understand you to say that Mr. McWhirter left the engine, passed down over the pilot and was out on the ground when you saw him?

A. 4. He was on the ground when I saw him.

Q. 5. How far was he from in front of that engine when he fell?

A. 5. That is pretty hard for me to judge, because he was in line of the engine and myself.

Q. 6. How far was it from where he fell to the switch which he was called on to turn?

A. 6. Perhaps three or four car lengths, maybe not so far.

Q. 7. How far is a car length—how many feet?

A. 7. That is pretty hard for me to say.

Q. 8. How long is a car?

A. 8. Well, the ordinary run thirty-six feet, some of them thirty, some of them forty.

Q. 9. Now, when you saw him fall how far was he from this switch?

A. 9. About three car lengths. About three car lengths.

Redirect Examination, by Mr. E. Boyd, Counsel for Plaintiff.

Q. 1. You say that at the time McWhirter fell he was in line with you and the engine. Explain what you mean by that?

A. 1. In direct with me—between where I stood and where he got off, putting me in direct line with him and where he got off. I can't tell whether he was ten, twenty or how far he was from the engine.

Q. 2. You mean, if I understand you, that the

train was coming towards you and he stepped off between you and the engine, is that correct?

A. 2. That is correct.

Q. 3. Do you know whether or not the cylinder heads of this engine were leaking?

A. 3. I couldn't say whether it was the cylinder heads or not. I recollect there was some steam or other from the engine.

Q. 4. Steam was escaping?

A. 4. Steam was escaping from the engine, as well as I recollect.

Cross-Examination, by Judge E. T. Bullock, Counsel for Defendant.

Q. 1. Do you know what caused that?

A. 1. I do not.

(The testimony of witness Roberson was also in the form of a **deposition**).

G. C. Loper, Conductor (Printed Record, pp. 25-6), was the conductor in charge of the train which ran over McWhirter. He testified that he started with his train at Illmo, Missouri, on the 22d of February, 1910, at 3:30 p. m., and arrived at Bush, Illinois, at **11:30 p. m. on the same day** (Printed Record, p. 26). They arrived at Wolf Lake the following morning on the return from Bush at 7:37 a. m., at which time and place McWhirter was killed. The engineer informed the conductor of the death of McWhirter. This witness testified that there was nothing wrong with the train, and that all of the appliances were in good condition (Printed Record, p. 27); that it was the duty of the brakeman to go forward and set the switch at Wolf Lake (Printed Record, p. 27).

(On page 26 of the Printed Record, the answer to Q. 5 is erroneously stated as **5:30 p. m.**, when it should

be 3:30 p. m. In other words, it would be less than sixteen hours from 5:30 p. m. to the time of the death of plaintiff's intestate.)

The conductor also testified that the train was traveling about **two miles an hour** when McWhirter was killed (Printed Record, p. 27).

The foregoing was practically all of the testimony in behalf of plaintiff, except that of Mrs. Cordie McWhirter (Printed Record, p. 35) as to the age and earning capacity of her husband and the ages of their minor children, which testimony it is not necessary to set out here.

DEFENDANT'S EVIDENCE.

(Printed Record, pp. 37, 38.)

Conductor Loper was recalled as a witness by the defendant (Printed Record, p. 37) and testified that Wolf Lake is **thirty-five miles** (35 miles) from Bush.

The foregoing was substantially all of the evidence relating to the management and control of the train, and as to what occurred at the time and place of accident. At the conclusion of the testimony, the defendant interposed a demurrer to plaintiff's evidence, which was overruled and exception duly saved.

DEMURRER TO EVIDENCE.

At the conclusion of the testimony, the Court was requested to give defendant's instruction No. 1, as follows:

1.

"The Court instructs the jury to find for the defendant."

This instruction was refused, and an exception duly saved at the time (Printed Record, p. 30).

The Court, at the instance of plaintiff and over the objection of defendant (Printed Record, p. 10) gave to the jury instructions "C", "E", "H" and "I", which said instructions are set out on pages 17 and 18, of the Printed Record, and read as follows:

"C."

"The Court instructs the jury that if you shall believe from the evidence that the train on which the decedent, Etwald McWhirter, was employed at the time of the accident which caused his death, was engaged or employed in interstate commerce; and, if you shall further believe from the evidence that the death of the said Etwald McWhirter resulted from the negligent or wrongful acts of the conductor, engineer, or servants of the defendant, superior in authority to the said Etwald McWhirter, you will find for the plaintiff such damages as you may believe from the evidence that she has sustained, not to exceed, however, the sum of $25,000.

Given Feby. 8, 1911."

"E."

"The Court further instructs the jury that if the train and locomotive on which the decedent, Etwald McWhirter, was employed at the time of the accident which caused his death was engaged in moving, transporting or handling cars, freight or articles of commerce between the States of Missouri and Illinois, or from a point in one of said States to any point in the other, then the said train and locomotive was engaged in interstate commerce.

Given Feby. 8. 1911."

"H."

"Negligence as used in these instructions is the failure to use such care as a reasonably prudent man would use under like or similar circumstances.

Given Feby. 8, 1911."

"I."

"The Court further instructs the jury that if you shall believe from the evidence that the said Etwal McWhorter had been permitted or required to be or remain on duty continuously for more than 16 consecutive hours next before the accident which caused his death, then the defendant was negligent and liable in damages for said injury and death of Etwal McWhorter, if you shall believe from the evidence that the permitting or requiring the said Etwal McWhorter to be or remain on duty continuously for more than 16 consecutive hours next before his death in any way contributed to the said accident and death, and you will find for the plaintiff such damages as you may believe from the evidence she has sustained by reason of his death, not exceeding the sum of $25,000.

Given Feby. 8, 1911."

Over the objection of both the plaintiff and the defendant (Printed Record, p. 10), **the Court, of its own motion**, gave to the jury instruction "X", which is set out on page 18 of the printed record, and reads as follows:

"X."

"The Court instructs the jury that unless they believe from the evidence that Etwal McWhorter came to his death on account of the carelessness or

negligence of the officers, agents and servants of the defendant or that said McWhorter was permitted or required by the defendant to be on duty more than 16 hours consecutively next before his death, and that his being permitted or required to be on duty more than 16 hours next before his death contributed to his death, the law is for the defendant and the jury should so find.

Given."

The cause was submitted to the jury upon the foregoing testimony and instructions, and a verdict returned in favor of the plaintiff in the sum of three thousand dollars.

JUDGMENT.

The Court, in due form, entered judgment in favor of the plaintiff as administratrix for the above sum of three thousand dollars and costs.

MOTION FOR A NEW TRIAL.

Defendant, in due time, filed its motion for a new trial, the grounds of which motion are assigned as follows (Printed Record, p. 34):

"Because the verdict of the jury is contrary to the law, and is not sustained by the evidence.

Because of error in giving and refusing instructions, which was excepted to at the time.

Because of the error of the Court in refusing to give to the jury instruction No. 1 offered by the defendant at the conclusion of plaintiff's testimony, and to which ruling of the Court the defendant excepted at the time, and still excepts."

Said motion for new trial was overruled, and an exception duly saved at the time (Printed Record, p. 34).

A good and sufficient appeal bond was filed, and the cause duly appealed to the Court of Appeals of Kentucky. A bill of exceptions was duly filed in accordance with the rules of procedure in said court. A transcript of the record was likewise filed in the Court of Appeals of Kentucky, and the cause set for oral argument in said court on the 11th of June, 1911. After oral argument and after briefs had been filed, the Court of Appeals took the case under advisement, and on the 17th day of November, 1911, affirmed the judgment (Printed Record, p. 40).

OPINION OF KENTUCKY COURT OF APPEALS.

(Printed Record, p. 40 et seq.)

The opinion of the Kentucky Court of Appeals is set out in full upon pages 41 to 52, inclusive, of the printed record, and reads as follows:

Court of Appeals of Kentucky.

St. Louis, Iron Mountain & Southern Railroad Company, Appellant,
vs.
Cordie McWhirter, Administratrix, Appellee.
} Appeal from Hickman Circuit Court.

Opinion of the Court by Judge Settle.

November 17, 1911.

This action was brought in the Hickman Circuit Court by appellee as administratrix of the estate of her deceased husband, Etwal McWhirter, to recover of appellant, its conductor and engineer, damages for his death, which occurred at Wolf Lake, Illinois, at which place one of appellant's

trains ran over his body; he being at the time in appellant's employ as a flagman on the train.

It was, in substance, alleged in the petition, as amended, that in his capacity as flagman by direction of his superiors, appellee's intestate left Illmo, Missouri, on the train in question at 3:30 p. m., February 22nd, 1910, for a run to Bush, Illinois, and was killed at Wolf Lake, Illinois, on the return trip, at 7:37 o'clock a. m., February 23rd, 1910, by the negligence of appellant, its agents and servants, in compelling him to remain continuously on duty as flagman on the train for more than sixteen consecutive hours, and also by the negligence of the conductor and engineer of the train in operating it.

It was further alleged in the petition, as amended, that the train by which the appellee's intestate was killed, was at the time of his death engaged in interstate commerce, that is, in the business of transporting freight between Missouri and Illinois; that in requiring the intestate to serve as a flagman on its train for a longer period than sixteen consecutive hours, appellant violated the provisions of Section 2, Chapter 2939, United States Compiled Statutes, being part of an Act of Congress entitled "An Act to Promote the Safety of Employes and Travelers Upon Railroads by Limiting the Hours of Service of Employes Thereon", which became a law March 4th, 1907; and also the provisions of another Act of Congress entitled "An Act Relating to the Liability of Common Carriers by Railroads to their Employes in Certain Cases", which became a law April 22nd, 1908.

Appellant's answer, except with respect to appellee's appointment and qualification as administratrix and right to sue as such, traversed the averments of the petition as amended, and in addi-

tion, alleged that in entering its service as a flagman appellee's intestate by contract assumed the ordinary risks incident to that service; that his death was an unavoidable accident and resulted from an ordinary risk such as he contracted to assume, for which reason the law imposed upon appellant no liability for his death. These averments were controverted by reply, and on the trial the jury returned a verdict awarding appellee $3,000 damages. Appellant complains of the judgment entered upon the verdict and the refusal of the Circuit Court to grant it a new trial, hence this appeal.

Section 2, Chapter 2939, United States Compiled Statutes, upon which appellee's action was based, reads as follows:

"Section 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employe subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever such employe of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted to again go on duty until he has had at least ten consecutive hours off duty; and no such employe who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty; Provided that no operator, train dispatcher, or other employe who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations

continuously operated night and day, for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in cases of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week; Provided, further, the Interstate Commerce Commission may, after full hearing in any particular case, and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case."

The evidence shows beyond doubt that the train on which the intestate was a flagman left Illmo, Missouri, at 3:30 p. m., February 22nd, 1910, for its regular run to Bush, Illinois, and return; and that in returning from the latter place to Illmo on the following day, February 23rd, 1910, the train ran over and killed the intestate at Wolf Lake, Illinois, a town and station situated on appellant's railroad. There is some doubt under the evidence whether the intestate's death occurred at 7:35 or 7:37 a. m., February 23rd, 1910, but none whatever that it was as late as 7:35. Guess, appellant's engineer, at the time in charge of the train, testified at the Coroner's inquest immediately following the accident, that the intestate's death occurred at 7:37 a. m., February 23rd, but later testified, in giving his deposition for use on the trial in the court below, that it occurred at 7:35 a. m., February 23rd.

Geo. C. Loper, a witness introduced on the trial by appellant, testified that the intestate was killed at 7:37 a. m., February 23rd, 1910, and no attempt was made by appellant to prove that he was killed earlier than 7:35 a. m. of that day, or that the intestate had not, when killed, been in service as

flagman on the train for as much as sixteen hours and five minutes consecutively.

It is immaterial, therefore, whether his death occurred at 7:35 or 7:37 a. m., February 23rd, 1910, as it is patent from the evidence that it occurred after more than sixteen consecutive hours of continuous service by him as flagman on the one train operating between Illmo, Missouri, and Bush, Illinois.

In thus requiring of the intestate more than sixteen consecutive hours of service, albeit the excess of service over the sixteen hours was but five or seven minutes, appellant violated the statute, *supra*; and as the death of the intestate, from the act of its engineer complained of, occurred while he was engaged in the required continuous service and after expiration of the sixteen consecutive hours allowed by the statute, there seems to be no escape from the conclusion that the act of appellant in thus extending his service beyond the statutory limit was negligence *per se*, to which the intestate's death must, as a matter of law, be attributed, and, if so, the right of appellee to maintain this action cannot be questioned.

We also find from the averments of the petition as amended that appellee asserts the right to recover of appellant the damages claimed on the ground that the death of her intestate was also attributable to the negligence of the conductor and engineer in charge of the train. The record fails to show any negligence on the part of the conductor, other than his act in continuing the train crew on duty longer than sixteen consecutive hours, but there was some evidence tending to show negligence on the part of the engineer, from which the jury had the right to determine whether it was a concurring cause of the intestate's death.

It appears from the testimony of the engineer

himself that the intestate's death occurred under the following circumstances: When the train reached Wolf Lake, the intestate, whose place as flagman was at the front end of the train, was notified by the engineer that it would stop over at that place on account of the sixteen-hour law. The intestate was then in the cab of the engine and he at once stepped out of the engine and along the foot-board from which he got to the ground ahead of the engine, for the purpose of throwing a switch that the train might be sidetracked. Although in view of the engineer all the time, the latter admitted he did not look to see where he was or what he did. Very soon after the intestate left the engine the engineer observed the Wolf Lake telegraph operator excitedly signaling him to stop the train, which was then moving at the rate of three or four miles an hour. The engineer immediately stopped the train and, upon stepping off the engine, was told by the operator he had run over the intestate, whose body was found under the tank wheel, cut in two.

In reply to the direct question, "How was he killed?" the engineer said, "Performing his duty; going out to set a switch."

According to the testimony of the operator, Loper, who seemed to be the only eye-witness to the accident, the intestate left the engine as described by the engineer and ran toward the switch but fell between the rails before reaching it. He then got upon his hands and knees, but before getting to his feet was run over by the engine. When he fell the operator began signaling the engineer to stop the train, but the latter failed to observe the signals in time to stop the engine before it ran over the intestate.

There was no proof that the manner in which the intestate approached the switch was not the

usual and an ordinarily safe way of doing so and of setting the switch; and as he was in plain view of the engineer from the time he left the engine, or would have been if the engineer had maintained a lookout in that direction, the latter, knowing he was going in front of the engine, should have kept such lookout for his movements; had he done so there was nothing to prevent his seeing him fall, and with the train going at only three or four miles an hour the reversal of the engine and application of the air brakes might, and in all probability would, have stopped the train in time to enable the intestate to regain his feet and make his escape.

If appellee's right of recovery had depended alone upon her ability to show that her intestate's death was caused by the negligence of the engineer, there was, as we have seen, evidence conducing to prove such negligence.

It is, however, proper to say that the negligence of appellant's engineer in the particular mentioned, and that of its conductor, or some other servant in control of its transportation department, in keeping appellee's intestate on duty as a brakeman for a longer period than sixteen consecutive hours, concurred in causing his death, and all being servants of appellant their negligence is chargeable to it. Therefore, the question of proximate cause raised by counsel for appellant can have no part in our consideration of the case.

Recurring to the appellant's violation of the provisions of the statute prohibiting it from requiring its employes to remain on duty longer than sixteen consecutive hours, we find that the language of the provision in question is mandatory and that the duty it imposes is a definite, absolute duty. Its non-performance may not, therefore, be excused by a showing on the part of the rail-

road company that it used ordinary care or reasonable diligence to perform it, but was unable to do so. The violation of such a statutory duty is, therefore, negligence *per se*. Our meaning cannot be better expressed than in the language of the following excerpt from the opinion of the Georgia Supreme Court in the case of Platt v. Southern Photo Material Co., 60 S. E. 1066:

"Every violation of any of those duties of omission or commission, which, arising from man's estate as a social being, has received recognition by the law of the land, either generally or specifically, is an act of negligence. So long as these duties remain undefined, or defined only in abstract, general terms, a breach is not properly denominated negligence *per se;* but when any specific act or dereliction is so universally wrongful as to attract the attention of the lawmaking power, and this concrete wrong is expressly prohibited by law or ordinance, a violation of this law, a commission of the specific fact forbidden is for civil purposes correctly called negligence *per se*. In those jurisdictions in which the application of the facts to the law rests with the jury, the Court cannot primarily declare that any particular concrete act, or state of circumstances amounts to a breach of duty unless the law so expressly declares. This finding is left to the jury; but if the law itself puts its finger on a particular thing and says, 'This is wrong', the Court may also (for there is no question to a fact which the law says exists) put its finger on that same thing and say, 'This is negligence—negligence *per se*.' This artificial distinction between negligence *per se* and negligence not *per se*, respects, therefore, merely the method by which the existence of negligence is to be ascertained in particular instances. When once its existence is determined, whether through the Court's judicial

cognizance, or the jury's findings, as a matter of fact, there is no further distinction made, and the one form of negligence has in the further consideration of the case just the same effect as the other —no more, nor less."

We have repeatedly recognized the rule here announced. Thus in National Casket Co. v. Power, 137 Ky. 156, which was an action to recover damages against the owner of an automobile by one whose horse was frightened and himself injured by the alleged negligence of the person in charge of the machine in failing to slacken its speed and give the signals of its approach as required by Section 2939g, Kentucky Statutes, we, in commenting on the effect of a failure to obey the statutory standards of care, in the opinion, said:

"The evidence for the plaintiff was that Moore did not sound any warning whatever; that he was driving the machine at a very high rate of speed, and that he did nothing toward respecting the safety of the ladies except swerve to the right so as to well miss their vehicle. These facts presented *prima facie* a case of negligence. The failure to sound the horn, or other similar contrivance to signal the approach of the car, was a violation of the statute, was *per se* negligence, and if the injury to the plaintiffs was occasioned thereby, being a proximate result of such failure, appellants are liable to respond in damages. Nashville, Chattanooga & St. Louis R. R. Co. v. Higgins, 29 R. 89, 92, S. W. 549; Cumberland Tel. Co. v. Yeiser, 141 Ky. 15."

In addition to the above authorities in this jurisdiction we cite the following cases of like import, decided by the courts of last resort of other states: Vandeveer v. Moran (Neb.), 112 N. W. 581; L. & N. R. R. Co. v. Haynes (Ind.), 91 N. E. 962.

Our attention has not been called to any case in

which the precise question upon which it is here sought to hold appellant responsible for the death of appellee's intestate has been passed on, but we find that the constitutionality of the Act of March 4th, 1907 (Chap. 2939, U. S. Comp. Stats.), was sustained by the Supreme Court in Balto. & Ohio R. R. Co. v. Interstate Commerce Commission, U. S. Supreme Court Advance Sheets, 621. The case arose on a bill in equity to annul an order made by the Interstate Commerce Commission, which required the carrier within the provisions of the act in question to make monthly reports, under oath, showing the instances where employes subject to the act had been on duty for a longer period than sixteen consecutive hours. In the opinion it is said:

"Although the question was not specifically raised by the bill it is now contended that the statute is unconstitutional in its entirety, and, therefore, no action of the commission can be based upon it. It is said that it goes beyond the power which Congress may exercise in the regulation of interstate commerce; that while addressed to common carriers engaged in interstate transportation by railroad to any extent whatever, its prohibitions and penalties are not limited to interstate commerce, but apply to intrastate railroads and to employes engaged in business. The prohibitions of the act are found in section 2. This provides that it shall be 'unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employe, subject to this act, to be or remain on duty' for a longer period than that prescribed. * * * But the argument undoubtedly involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employes in such manner that

the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employes who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation. This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce, and of those who are employed in transporting them. * * * The fundamental question here is whether a restriction under the hours of labor of employes who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of its employes and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider and to endeavor to reduce the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons placed within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the

Constitution. Chicago, B. & Q. R. R. Co. v. McGuire, 219 U. S. 549, *ante* 259, 31 Sup. Ct. Rep. 259. If, then, it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employes engaged in interstate transportation, it follows that the power cannot be defeated by prolonging the period of service through other requirements of the carriers, or by the commanding of duties relating to interstate and intrastate operations." It appears that other objections were made to the validity of the statute; that it was void for uncertainty; that the Interstate Commerce Commission was without authority to require the reports called for by its orders; and that to compel the disclosures by these reports of violations of the law would be contrary to the Fourth and Fifth Amendments to the Constitution of the United States, having reference to unreasonable search and seizure and privilege against self-crimination. These objections were all elaborately considered in the opinion and disposed of adversely to the contentions of the railroad company. The case, *supra*, effectually disposes of the objections raised in this case by counsel for appellant to the constitutionality of the act in question and renders further consideration thereof by us unnecessary.

While, as previously stated, we have been referred to no case determining the carrier's liability for the death of a train employe while engaged in its service, in violation of the restriction contained in the act limiting such service to sixteen consecutive hours, we find numerous cases which, in construing that part of the act, and a previous act, relating to the equipment of cars engaged in interstate commerce with safety appliances, hold that it abolishes the fellow-servant doctrine and also the doctrine of assumption of risk; further-

more, that if a railroad in the operation of its cars violates a duty enjoined by the provisions of the act, which results in injury to an employe, such violation imposes upon it the duty to make compensation to the person injured. United States v. Atchison, T. & S. F. R. Co., 163 Fed. Rep. 517; Watson v. St. Louis, Iron Mountain & Southern R. R. Co., 169 Fed. Rep. 942; Southern R. R. Co. v. Carson, 194 U. S. 136; U. S. v. Atlantic Coast Line R. R. Co., 153 Rep. 918; U. S. v. Southern R. R. Co., 135 Fed. Rep. 122; U. S. v. Great Northern R. R. Co., 150 Fed. Rep. 229. In other words, as held in St. Louis, Iron Mountain & Southern R. R. Co. v. Taylor, 210 U. S. 281:

"The obvious purpose of the Legislature (*i. e.*, Congress) was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does in point of fact, use cars which do not comply with the standard, it violates the plain provisions of the law, and there arises on that violation the liability to make compensation to one who is injured by it."

In Chicago, B. & Q. Ry. Co. v. U. S., July, 1911, Supreme Court Advance Sheets, 612, it was held that a carrier using, in moving interstate traffic, cars whose condition do not satisfy the requirements of the safety appliance act, cannot escape the penalty therein prescribed by showing that it exercised reasonable care in equipping its cars with the required safety appliances, and used due diligence to keep them in repair by the usual inspection, as the statutes impose an absolute duty upon the carrier which is not discharged by the exercise of reasonable care or diligence.

In the opinion delivered by Mr. Justice Harlan, the reasoning and conclusions of the Court in the leading case of St. Louis, I. M. & S. R. R. Co. v.

Taylor, 210 U. S. 281, were adopted, following which it is said:

"It cannot then be doubted that this court in the Taylor case considered the scope and effect of the safety appliance act of Congress as directly involved in the questions raised in that case, and it expressly decided that the provision in the second section relating to automatic couplers imposed an absolute duty on each corporation in every case to provide the required couplers on cars used in interstate traffic. It also decided that non-performance of that duty could not be evaded or excused by proof that the corporation had used ordinary care in the selection of proper couplers, or reasonble diligence in using them and ascertaining their condition from time to time. That the Taylor case as decided by this court has been so interpreted and acted upon by the Federal courts generally is entirely clear, as appears from the cases cited in the margin. * * * The Taylor case was a strictly civil proceeding, being an action by an individual to recover damages for a personal injury alleged to have been caused by the negligence of the corporation; whereas, the present action is to recover a penalty. This difference, it is suggested, will justify a re-examination, upon principle, of the rule announced in the Taylor case. In effect the contention is that the present action for a penalty is a criminal prosecution, and that the defendant cannot be held guilty of a crime when it had no thought or purpose to commit a crime and endeavored with due diligence to obey the act of Congress. This contention is unsound because the present action is a civil one. It is settled law that 'a certain sum, or sums which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by a civil action, even if it may also be recovered

in a proceeding which is technically criminal.' Hepner v. U. S. 213, U. S. 103. * * * The power of the Legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned."

As further illustrating the harmony of opinion manifested by the Federal courts with respect to this question, consideration of the very recent case of Delk v. St. Louis & S. R. R. Co., July, 1911, Advance Sheets, U. S. Supreme Court Reports, 617, will be found instructive. Delk sued the St. Louis and San Francisco R. R. Co., a Missouri corporation, engaged in commerce as a carrier of freight and passengers, through Missouri, Tennessee and other states, for damages resulting from injuries he sustained while engaged in the discharge of his duties as a brakeman of the railroad company. On the petition of the railroad company the case was removed to the Circuit Court of the United States on the ground of diversity of citizenship. The basis of the plaintiff's claim, as set forth in the declaration, was the alleged failure of the railroad company to provide proper automatic couplers as required by the safety appliance act. The answer of the railroad company traversed the averments of the declaration and pleaded contributory negligence on the part of the plaintiff.

It appeared from the facts presented by the record that the car with the defective coupler which caused the injury was loaded with lumber and had been received by the railroad company to be carried to Memphis, Tennessee; the latter delivered it to the Union Railway Company for transportation to its destination. After receiving the car and before moving it, the Union Railway Company discovered that it was provided with a defective coupler and immediately returned it to the defendant

railroad, which placed it on a side track in its yard, where it was examined by its inspector, who put upon it a placard containing the words "out of order". On the following day Delk was injured in an effort to couple the defective car to another for its removal from the side track. Owing to its defective coupling, he could not couple the cars without going between them, which he did, and in attempting with his foot to hold the draw bar of the defective car until the coupling of the car could be effected by the impact, his foot was caught between them and crushed.

On the trial the Circuit Court seemed to have instructed the jury, in substance, that as a matter of law, the statute imposed upon the railroad company the absolute duty to keep its cars provided with the character of coupling appliances described in the statute, and that in failing to so provide the car by which Delk was injured and in attempting to move the car in its defective condition, it was guilty of negligence which entitled him to recover, unless he was himself guilty of negligence, which so contributed to his injury, that but for such negligence he would not have been injured. So, the only issue submitted to the jury was as to the question of contributory negligence.

The trial in the Circuit Court resulted in a verdict and judgment in favor of Delk for $7,500, which that court compelled him, by remittitur, to reduce to $5,111. The Circuit Court of Appeals reversed the judgment and remanded the case for a new trial, following which the Supreme Court allowed a writ of *certiorari*, and upon a review of the errors assigned, that court reversed the judgment of the Circuit Court of Appeals, and affirmed the judgment of the Circuit Court.

In an able opinion delivered by Mr. Justice Harlan, the following conclusion was expressed:

"As the case is here upon *certiorari* to review the judgment of the Circuit Court of Appeals, this court has the entire record before it, with the power to review the action of that court, as well as direct such disposition of the case as that court might have done when hearing the writ of error sued out for review in this action of the Circuit Court. Lutcher & M. Lumber Co. v. Knight, 217 U. S. 257. In this view the judgment of the Circuit Court of Appeals must be reversed, because, for the reasons above stated, it erred in not holding that the statute under which the case arose imposed on the carrier an absolute duty to provide its cars, when moving interstate traffic, with the required couplers and keep them in proper condition, and that too, without any reference to the care of diligence which might have been exercised in performing its statutory duty. But on looking further into the record from the Circuit Court, we find that no error of law was committed by that court; for it proceeded on the construction of the statute which this court has approved in Chicago, B. & Q. R. R. Co. v. United States, just decided. Nor did the Circuit Court commit any error in respect to any issue of contributory negligence. It properly submitted that question to the jury. Therefore, the reversal of the judgment of the Circuit Court of Appeals, on the ground we have above stated, constitutes no reason why the judgment of the trial court should be disturbed."

It should be stated in this connection that at the time of the trial of the Delk case, and until the original Safety Appliance Act of 1893 was amended by that of April 22nd, 1908, contributory negligence on the part of a person injured by a defective car, could be relied upon by a railroad company, as a ground of defense in an action under the safety appliance statute for such injury; but

the amendment in question, which was in force when the appellee's intestate in the instant case was injured, excludes such a defense. Schlemmer v. Buffalo R. & P. Co., July, 1911, Advance Sheets U. S. Supreme Court Reports, 561. As the defense of assumption of risk was abrogated by the original act, neither of these doctrines has any place in this case.

In view of the foregoing authorities, State and Federal, we conclude that the facts alleged by appellee in her petition, and fairly sustained by the evidence appearing in the record, fasten upon appellant responsibility for her intestate's death. If the grounds of defense interposed by the appellant's answer would be unavailing, had the intestate's death been caused by a defective appliance on one of its cars, they must upon principle, be held equally so, where the death was caused by its wrongful act in requiring him to continue in the performance of his duties as a brakeman in its service, beyond sixteen consecutive hours, even though the negligence involved in the act was only a concurring cause, operating with the negligence of its engineer, in bringing about the death."

The requirements of the statute with respect to the safety appliances to be used on appellant's trains, are no more imperative or mandatory than is the statutory restriction here involved upon its right to suffer its employes to engage in its service more than sixteen consecutive hours. The violation of the statute in either case invites the penalty prescribed, and the offender will not be excused upon a showing of reasonable effort or diligence in attempting to comply with the statutory requirements.

Appellant did not attempt to bring itself within the provisions of Section 3 of the Act of March, 1907, for its answer contains no plea that its vio-

lation of the statute was occasioned by casualty, unavoidable accident, the act of God, or any other cause allowed by that section as an excuse.

In our view of the case there was no error in the trial court's refusal to give the peremptory instruction asked by appellant, and it is not perceived that any just reason is presented for its objections to the instructions that were given to the jury.

Instruction No. 1 authorized a verdict for appellee if the train by which her intestate was killed was, at the time, engaged in interstate commerce, and his death was caused by the negligence of the engineer operating the train. We are unable to see any error in this instruction. **It is conceded the train was engaged in interstate commerce, but whether so or not, if the intestate's death resulted from the negligence of the engineer alone, appellant would, as master, be responsible therefor, independently of its negligence in violating the sixteen-hour law.**

Instruction 2 merely defines the meaning of the words "interstate commerce", and is unobjectionable in form.

Instruction 3 properly defines negligence as used in the instructions; and by instruction 4 the jury, in substance, were told that if they believed from the evidence appellee's intestate had been permitted or required by appellant to remain on duty as a brakeman continuously for more than sixteen consecutive hours,, immediately before his death, appellant was negligent by reason thereof, and liable in damages for the intestate's death, if they further believe from the evidence such negligence contributed to his death; and if they so believed, they should find for appellee such damages as resulted from appellant's negligence in thus caus-

ing her intestate's death, not to exceed $25,000, the amount claimed in the petition.

This instruction correctly stated the law on the feature of the case intended to be covered by it, and as our reasons for this conclusion have already been fully stated, further elaboration of this is unnecessary.

Instruction 5 is but the converse of instruction 4, and while unnecessary, was not improper.

Instructions 1, 2, 4 and 5 might have been more aptly expressed, but being substantially correct, mere inaptness of statement furnishes no ground for condemning them.

Appellant complains, however, that there was no instruction given the jury on the measure of damages. This is true, and such an instruction should have been given, but the failure of the Court to give it is not ground for a reversal because appellant did not ask such an instruction, although others were requested by it with reference to other features of the case.

In Louisville & Nashville Railroad Co. v. Roberts, 24 R. 1160, we said:

"It has been so frequently held that it is deemed unnecessary to again elaborate the idea that, in a civil case, unless the objecting party offers an instruction covering the point of his objection, he will not be heard, upon appeal of the inadequate instruction given. Swandale Lumber Co. v. Thomas, 129 Ky. 799; Patterson v. T. J. Moss Tie Co., 97 S. W. 399; L. & N. R. R. Co. v. Harrod, 115 Ky. 877."

We have also held that when an improper instruction as to the measure of damages has been given, the error would be cured by the verdict of the jury, if such verdict be as small as it would have been had the proper instruction been given. Ky. Distillery & Warehouse Co. v. Barret, 112

S. W. 643; Katterjohn v. Nahm *et al.*, 106 S. W. 1179, 32 Ky. L. R. 727.

As appellee's intestate was a young man about thirty years of age with an expectancy, at least, of 27 years, it is apparent that the destruction of his power to earn money damaged his estate, even more than the three thousand dollars awarded by the verdict of the jury; it is patent, therefore, that the appellant's rights were not prejudiced by the failure of the Court to give an instruction on the measure of damages.

Appellant also complains of the refusal of the Circuit Court to remove the case to the United States Circuit Court for the District of Kentucky. It appears that the courts of the several states are, by the provision of the statute, *supra*, and the amendment of April 22nd, 1908, given jurisdiction concurrent with that of the courts of the United States, in cases arising under the statute. It is true, appellant's petition rested its right to be removed on the ground of diversity of citizenship, but as it took no exception to the action of the Court in refusing the removal, its complaint of the removal will not now be entertained.

In conclusion, we are moved to say that the salutary object designed by the enactment of the statute, *supra*, would, in our opinion, be defeated if we should hold its provisions inapplicable to a case like the one at bar. Its aim is the protection of the lives of employes of railroad companies, and also the lives and property entrusted to the railroads as common carriers. It recognizes that there is a limit to human endurance and that hours of rest and recreation, as well as the use of good machinery and appliances, are needful to the health and safety of men engaged in the hazardous work of railroading and that the benefit is intended to confer will better enable them to serve

their employers and promote the ends of commerce. The application of the provisions of the statute may sometimes bear harshly upon an offending railroad company, but, on the whole, their just enforcement, in all proper cases, is bound to be promotive of the public welfare.

The errors assigned not justifying a reversal, the judgment is affirmed.

DEFENDANT'S MOTION FOR REHEARING.

(Printed Record, pp. 53-4.)

Defendant's motion for rehearing appears upon pages 53 and 54 of the printed record, and reads as follows:

In the Court of Appeals of Kentucky.

Mrs. Cordie McWhirter, Administratrix of the Estate of Etwal McWhirter, Deceased (Plaintiff), Appellee,

vs.

St. Louis, Iron Mountain & Southern Railway Company (Defendant), Appellant.

Appellant's Motion for Rehearing, with Brief and Argument in Support of Same.

Now comes said appellant, by its attorneys, and moves the Court to set aside the order and judgment of affirmance entered herein on November 17, 1911, and to grant it a rehearing for the following reasons:

I. Because the Court erred in holding that plaintiff's petition, including the amendment, contained facts sufficient to authorize a recovery in favor of plaintiff based upon the alleged negligence

of the conductor and engineer at the time and place of accident.

II. Because in considering the case, the Court, as shown by its opinion, overlooked and misconstrued the evidence disclosed by the record in respect to the alleged negligence of the engineer at the time and place of accident.

III. Because the Court erred in holding that plaintiff's instruction marked "C" (p. 34 of Record) properly declared the law.

IV. Because the Court erred to the prejudice of appellant in its construction of the Federal Employers' Liability Act of 1908 (35 U. S. Stat. at Large, 65, Chap. 149), as applicable to the facts and pleadings disclosed by the record in this cause.

V. Because the Court misconstrued the Employers' Liability Act of 1908, and erred in holding that appellant was an insurer as against the act of the engineer in running over deceased at the time and place of accident.

VI. Because the Court erred in holding that there was any legal evidence shown at the trial with reference to the conduct of the engineer at the time and place of accident, which operated as a proximate cause of the death of plaintiff's husband.

VII. Because the Court, in the opinion of counsel for appellant, in the consideration of this case has misconstrued and erroneously applied the principles of law involved in the Hours of Service Act (34 U. S. Stat. at Large, 1415, 1416, Chap. 2939) to the case at bar.

VIII. Because the Court, in our opinion, misconstrued the Hours of Service Act, *supra*, as applicable to the facts in this case.

IX. Because, in the opinion of appellant's counsel, the Court misconstrued the Hours of Service

Act in holding that a right of action could be maintained thereunder, on account of the provisions of the Employers' Liability Act, *supra*, which authorize a recovery for damages where any statute enacted for the protection of an employe has been violated.

Respectfully submitted,
E. T. Bullock and
R. T. Bailey,
Attorneys for Appellant.

Defendant filed a printed brief in support of its motion for rehearing (Printed Record, pp. 59 to 88, inc.), including therein a copy of the Employers' Liability Act of 1908 (Printed Record, pp. 54 to 56, inc.), the Employers' Liability Act, as amended in 1910 (Printed Record, pp. 56, 57), and also the Hours of Service Act (Printed Record, pp. 57 and 58). Defendant also set out as a part of said brief two photographs of the locomotive on which plaintiff's intestate was riding at the time of his death (Printed Record, pp. 58, 59), showing, respectively, the side of the engineer and that of the fireman. These photographs were taken after the case went to the Court of Appeals.

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR REHEARING.

Defendant's brief in support of its motion for rehearing is printed in full in the record, pages 59 to 88, inclusive, but owing to its length is not embodied in this statement.

PLAINTIFF'S RESPONSE TO PETITION FOR REHEARING.

The response of plaintiff to defendant's petition and brief for rehearing is set out upon pages 88 and 89 of the printed record.

MOTION FOR REHEARING OVERRULED.

On the 5th day of January, 1912, defendant's motion for rehearing was overruled by the Kentucky Court of Appeals.

On January 13, 1912, plaintiff in error presented to Chief Justice J. P. Hobson, of the Kentucky Court of Appeals, at his chambers in the City of Frankfort, in said State, its petition for a writ of error (Printed Record, pp. 94-5), accompanied by an assignment of errors (Printed Record, pp. 90-94), and likewise a writ of error bond (Printed Record, pp. 97-8). The Chief Justice aforesaid approved said bond, and allowed the writ of error. The latter appears upon pages 96 and 97 of the printed record. The Chief Justice also on the date aforesaid issued a citation as required by law (Printed Record, p. 99), and counsel for defendant in error on the same day waived service thereon (Printed Record, p. 99).

All of the foregoing proceedings were made a matter of record in the office of the Clerk of the Kentucky Court of Appeals, and a certified transcript thereof, including all the proceedings before said Court, was made out in due form and within the time required by law, and filed in the office of the clerk of this court. The clerk of this court has printed the record in full, and copies of same have been duly furnished counsel for both plaintiff and defendant in error.

The Employers' Liability Act and the amendment of same, as well as the Hours of Service Act, are set out in full upon pages 54 and following of the printed record, and are as follows:

"Employers' Liability Act of 1908.

"An Act Relating to the Liability of Common Carriers by Railroad to Their Employes in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories or between the District of Columbia and any of the States or Territories or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such em-

ploye; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: Provided, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall

to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Sec. 7. That the term 'common carrier' as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employes under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the acts of Congress entitled 'an act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employes, approved June eleventh, nineteen hundred and six.

Approved April 22, 1908."

(35 U. S. Stat. at L. 65 C. 149.)

Employers' Liability Act, Amendment of 1910.

"An Act to Amend an Act Entitled 'An Act Relating to the Liability of Common Carriers by Railroad to Their Employes in Certain Cases', Approved April Twenty-second, Nineteen Hundred and Eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled 'An Act relating to the liability of common carriers by railroad to their employes in certain cases', approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

'Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

'Under this act an action may be brought in a Circuit Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States.'

Sec. 2. That said act be further amended by adding the following section as section nine of said act:

'Section 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury.'

Approved April 5, 1910."

"Hours of Service Act.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers, their officers, agents and employes, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad', as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'employes', as used in this act, shall be held to mean persons actually engaged in or connected with the movement of any train.

Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employe subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employe who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least

eight consecutive hours off duty: Provided, That no operator, train despatcher, or other employe, who, by the use of the telegraph or telephone, despatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in case of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: Provided, further, The Interstate Commerce Commission may, after full hearing in a particular case, and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

Sec. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employe to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such District Attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to

lodge with the proper District Attorneys information of any such violations as may come to its knowledge. In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: Provided, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officers or agent in charge of such employe at the time said employe left a terminal, and which could not have been foreseen: Provided further, That the provisions of this act shall not apply to the crews of wrecking or relief trains.

Sec. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act.

Sec. 5. That this act shall take effect and be in force one year after its passage."

(34 U. S. Stat. at L. 1415, 1416, C. 2939.)

ASSIGNMENT OF ERRORS.

The assignment of errors, which accompanied the petition for writ of error, appears in full upon pages 90 to 94, inclusive, of the Printed Record, and reads as follows:

United States of America—ss.

In the Supreme Court of the United States.
In the Court of Appeals of Kentucky.

St. Louis, Iron Mountain and Southern Railway Company (Appellant), Plaintiff in Error,
vs.
Mrs. Cordie McWhirter, Administratrix of the Estate of Etwal McWhirter, Deceased (Appellee), Defendant in Error.
} No. —.

Assignment of Errors by Plaintiff in Error.

Now comes the St. Louis, Iron Mountain and Southern Railway Company, appellant in the Court of Appeals of Kentucky, and plaintiff in error in a writ of error to the Court of Appeals of Kentucky from the Supreme Court of the United States, duly allowed, in the above-entitled cause of Mrs. Cordie McWhirter, administratrix of the estate of Etwal McWhirter, deceased, appellee and defendant in error, against the St. Louis, Iron Mountain and Southern Railway Company, appellant in said Court of Appeals of Kentucky and plaintiff in error in said writ of error in the Supreme Court of the United States in said cause, and upon a judgment in the Court of Appeals of Kentucky, at the September Term thereof, A. D. 1911, and on the 17th day of November, 1911, in the above-entitled cause, the said St. Louis, Iron Mountain and Southern Railway Company, de-

fendant and appellant in the Court of Appeals of Kentucky and plaintiff in error in said writ of error returnable into the Supreme Court of the United States, according to law, does say, by its attorneys and counsel in this behalf, that: In the record and proceedings in said cause there is manifest error to its prejudice upon the merits of said cause, and they assign error in said record and proceedings, to-wit:

I. The said Court of Appeals of Kentucky erred in its construction of the Federal Employers' Liability Act of 1908, in holding that plaintiff's petition, including the amendment thereto, contained facts sufficient to authorize a recovery in favor of said defendant in error, based upon the alleged negligence of the conductor and engineer at the time and place of accident, as said petition and amendment in respect to the matters aforesaid simply plead legal conclusions, without any issue of fact being tendered or pleaded therein.

II. That the said Court of Appeals erred, as shown by the undisputed facts in the record, in holding that there was any legal evidence offered at the trial either proving, or tending to prove, that said defendant's conductor and engineer, or either of them, were guilty of any negligence whatever at the time deceased was killed.

III. That said Court of Appeals erred in sustaining the trial court as to the legality of plaintiff's instruction "C" given at her instance, as follows:

"The Court instructs the jury that if you shall believe from the evidence that the train on which the decedent, Etwal McWhirter, was employed at the time of the accident which caused his death, was engaged or employed in interstate commerce, and if you shall further believe from the evidence that the death of the said Etwal McWhirter re-

sulted from the negligence and wrongful acts of the conductor, engineer, or servants of the defendant superior in authority to the said Etwal McWhirter, you will find for the plaintiff such damages as you may believe from the evidence that she has sustained, not to exceed, however, the sum of $25,000."

Said instruction is erroneous, because the petition fails to state a cause of action, because there is no legal evidence shown in respect to the alleged negligence of defendant's servants at the time and place of accident, and because the jury were given a roving commission by said instruction to convict defendant of a violation of some supposed duty not pleaded, and without the jury being required to find such facts, if they existed, as would have rendered defendant liable under either Act of Congress pleaded in petition, or under any other statute or law.

IV. That the Court of Appeals of Kentucky, as shown by its opinion, erred in construing the Federal Liability Act of 1908 (35 U. S. Stat. at Large, 65, Chap. 149), as applicable to the facts and pleadings disclosed by the record in this cause, or as affording any basis of recovery in behalf of defendant in error.

V. That said Court of Appeals erred in construing said Federal Employers' Liability Act of 1908, so as to make plaintiff in error an insurer of deceased, as against the alleged personal negligence of the engineer at the time and place of accident.

VI. That said Court of Appeals erred in holding that plaintiff in error, under the pleadings and on the facts disclosed by the record, was an insurer as to the safety of deceased either under said Employers' Liability Act of 1908, or under said Federal Hours of Service Act (34 U. S. Stat. at Large, 1415, 1416, Chap. 2939), or under both combined.

VII. That said Court of Appeals erred in holding, as shown by its opinion and the record, that plaintiff in error was an insurer as to the safety of deceased, under either of the acts aforesaid or under any other statute or law upon the subject.

VIII. That said Court of Appeals erred in holding that there was any legal evidence shown at the trial with reference to the conduct of the engineer at the time and place of accident, which operated as a proximate cause of the death of plaintiff's said husband.

IX. That said Court of Appeals erred in holding that the contributory negligence of deceased and his assumption of risk at the time and place of accident were not available to defendant as a defense, on account of the risks assumed by deceased, nor by way of diminution of damages on account of his contributory negligence.

X. Tht said Court of Appeals erred in refusing to hold that, on the undisputed facts disclosed by the record, the deceased lost his life by reason of his own voluntary acts, without any reference to the alleged wrongful and negligent acts of defendant or its servants.

XI. That said Court of Appeals erred in holding that plaintiff was entitled to recover by reason of the alleged violation of the Hours of Service Act by defendant, although deceased himself was assisting in its alleged violation at the time and place of accident, if said statute was violated as alleged.

XII. That said Court of Appeals erred in holding that plaintiff in error was an insurer as to the safety of deceased under the Federal Hours of Service Act (34 U. S. Stat. at Large, 1415, 1416, Chap. 2939), and especially erred in holding that the alleged violation of said act made defendant an insurer, although there was no causal connec-

tion between said alleged violation and the death of deceased.

XIII. That said Court of Appeals erred in holding that the alleged violation of said sixteen-hour law was negligence *per se,* and made defendant liable as an insurer, although said alleged negligence was not the proximate cause of the death of deceased.

XIV. That said Court of Appeals erred in holding that plaintiff's instruction "I" correctly declared the law, for the same reasons set out in the preceding paragraphs XII and XIII of this assignment, which said instruction reads as follows:

"The Court further instructs the jury that if you shall believe from the evidence that the said Etwal McWhirter had been permitted or required to be or remain on duty continuously for more than sixteen consecutive hours next before the accident which caused his death, then the defendant was negligent and liable in damages for said injury and death of Etwal McWhirter, if you shall believe from the evidence that the permitting or requiring the said Etwal McWhirter to be or remain on duty continuously for more than sixteen consecutive hours next before his death in any way contributed to the said accident and death, you will find for the plaintiff such damages as you may believe from the evidence she has sustained by reason of his death, not to exceed the sum of $25,000."

XV. That the said Court of Appeals erred in holding that the alleged violation of said sixteen-hour law conferred upon plaintiff a right of action for damages, or that a right of action survived to plaintiff under said act as the legal representative of her said husband.

XVI. That the Court of Appeals of Kentucky, as well as the Circuit Court, erred in holding that

there was sufficient evidence, or any evidence, adduced at the trial to show that deceased had been on duty for a longer period than sixteen **consecutive** hours immediately preceding his death, or that he had been actually on duty any substantial portion of the time between 3:30 p. m. on February 22, 1910, when he left Illmo, Missouri, for Bush, Illinois, with nine empty cars for coal, and 7:35 the following morning, when he was killed at Wolf Lake, Illinois.

XVII. That said Court of Appeals and said Circuit Court erred in holding that the Hours of Service Act, *supra*, applied to the case at bar, as the undisputed facts in the record show that deceased left Bush at 12:30 or 1:00 o'clock on the morning of February 23, 1910, for Wolf Lake, and that the distance between said points, as shown by the record, is only thirty-five miles; that defendant, appellant in the said Court of Appeals, was not bound to anticipate that its servants, with all the machinery and appliances in good shape, as shown by the record, could not safely reach Wolf Lake in six hours and thirty minutes, when the distance was only thirty-five miles; and that by reason of the foregoing, said act does not apply, as shown by the provisos of section three of same.

XVIII. That said Court of Appeals erred in holding that the provisos mentioned in section three of the Hours of Service Act do not apply to the case at bar, because the answer of appellant did not plead same, although the facts relating thereto were introduced in evidence by plaintiff as part of her case in chief, without objection, and hence should be considered by the Court, although said answer does plead that the death of deceased was due to an unavoidable accident.

XIX. That said Court of Appeals erred in over-

ruling appellant's motion for a rehearing filed in said court, and likewise erred in refusing to reverse said cause without remanding and in entering judgment for appellant on account of the matters aforesaid and on the undisputed facts disclosed by the record.

XX. That said Court of Appeals erred in holding that any right of action survived under either the Employers' Liability Act of 1908, or the amendment thereto passed in 1910, as the latter did not become effective until April, 1910, while deceased was killed on February 23, 1910.

XXI. That said Court of Appeals erred in holding that the Amendment to the Employers' Liability Act of 1908, passed by Congress in 1910, was retroactive in its operation, and authorized said Circuit Court to try said cause under either or both of the acts pleaded and relied on in her petition as a basis of recovery.

XXII. That the Court of Appeals of Kentucky erred in its construction of the Hours of Service Act, *supra*, as shown by its opinion, as follows:

"In thus requiring of the intestate more than sixteen consecutive hours of service, albeit the excess of service over the sixteen hours was but five or seven minutes, appellant violated the statute, *supra*; and as the death of the intestate, from the act of its engineer complained of, occurred while he was engaged in the required continuous service and after the expiration of the sixteen consecutive hours allowed by the statute, there seems to be no escape from the conclusion that the act of appellant in thus extending his service beyond the statutory limit was negligence *per se*, to which the intestate's death must as a matter of law be attributed, and if so, the right of appellee to maintain this action cannot be questioned."

For the foregoing prejudicial errors, and each

of them, affecting the merits of this cause, appellant (plaintiff in error) prays a reversal of the judgment of the said Circuit Court of Hickman County, Kentucky, and the judgment of affirmance thereof by the Court of Appeals of Kentucky.

And the said St. Louis, Iron Mountain and Southern Railway Company, as plaintiff in error, prays that the judgment aforesaid, for each of the errors aforesaid and for other errors in the record and proceedings in said cause, whereby the said plaintiff in error has been by said judgment deprived of its rights, privileges and immunities, and for each of the errors and matters above assigned, be reversed, annulled and held for naught; and that the said plaintiff in error may be restored to all things which it has lost by reason of said judgment of the said Court of Appeals of Kentucky, and by the judgment of the said Circuit Court of Hickman County, Kentucky, affirmed thereby.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

By E. T. BULLOCK AND
R. T. RAILEY,
Its Attorneys of Record.

Filed Jan. 13, 1912.
ROBT. L. GREENE, *C. C. A.*

EXPLANATION.

As a matter of convenience, we shall endeavor to condense the foregoing assignments of error into a short form to exhibit the final contentions of plaintiff in error concerning the vital points of the controversy.

SPECIFICATIONS OF ERROR.

I.

The plaintiff in error specifies the following errors in the judgment, record and proceedings of the Court of Appeals of Kentucky, and by reason of each thereof prays that the judgment of said Court be reversed, with such directions touching the further proceedings as may be just.

FIRST SPECIFICATION OF ERROR.

Plaintiff's petition and the amendment thereto fail to state any cause of action either under the common law, the Federal Employers' Liability Act of 1908, the Hours of Service Act, or any other law or statute. The charging part of said petition reads as follows:

"That the death of the said Etwal McWhirter resulted from the wrongful acts of the conductor and engineer in charge of the train and locomotive on which the said Etwal McWhirter, de-

ceased, was at the time of his death employed and acting as flagman, as aforesaid, and by the negligence and wrongful acts of the train dispatcher and higher officials, who had control and authority over this plaintiff's intestate, of the defendant, St. Louis, Iron Mountain & Southern Railway Company; that the said Etwal McWhirter was killed while so acting as flagman, and at a time he was employed by the St. Louis, Iron Mountain & Southern Railway Company, by being run over and crushed and mangled by the train and locomotive of the said defendant herein; that at the time of the said **accidental** death of the aforesaid Etwal McWhirter, the train and locomotive on which he was so employed and on which he was acting in the capacity of flagman for the defendant herein, was engaged in the transportation of freight between the States of Missouri and Illinois, and that the said train and locomotive aforesaid was an interstate train and was engaged in interstate commerce between the aforesaid States of Missouri and Illinois.

"Plaintiff further says that her cause of action herein arose against the defendant by reason of the wrongful and negligent death of her aforesaid husband, Etwal McWhirter, which was occasioned by the negligent and wrongful acts of officers and agents of the defendant, as aforesaid, in managing and operating its train, while her husband was employed by the defendant, St. Louis, Iron Mountain & Southern Railway Company, as flagman on a train and locomotive engaged in interstate commerce as aforesaid; that her said husband had been permitted and required

by the officers and agents of the defendant to be and remain on duty for a longer period than sixteen consecutive hours next before the aforesaid accident, and in violation of Chapter 29-39, Section 2, 34 Statute 1416 of the Acts of Congress of the United States relating to interstate commerce, and being a part of an act entitled, 'An Act to Promote the Safety of Employes and Travelers Upon Railroads by Limiting the Hours of Service of Employes Thereon', which became a law on the 4th day of March, 1907, and also an act entitled, 'An Act Relating to the Liability of Common Carriers by Railroad to Their Employes in Certain Cases', which became a law on the 22d day of April, 1908; and that the aforesaid negligent and wrongful acts of the officers and agents of the said defendant, and the said violation of the laws of the United States relating to interstate commerce were the proximate and sole causes of the death of her said husband, and she relies on the laws of the United States made and provided in such cases." (This brief, pp. 26 and 27.)

(*a*) We have demonstrated upon pages 2 to 15, inclusive, of this brief that no common-law cause of action was stated in the petition, for the obvious reason that, unless conferred either by some Act of Congress or statute, the personal right of action dies with the person, and hence the administratrix could not have sued in Kentucky for the death of her husband in Illinois under a common-law cause of action for negligence.

(*b*) We have likewise demonstrated, under the same authorities, that the engineer in charge of the train which killed plaintiff's husband and the deceased were fellow-servants under the common law, and that by reason thereof, aside from any congressional act or statute, said administratrix could not maintain an action against plaintiff in error on account of the alleged negligence of said engineer at the time and place of accident. It is clear, therefore, under the foregoing authorities that no cause of action was stated in the petition or shown at the trial in respect to any common-law right.

(*c*) We have likewise shown, on pages 6 to 16 of this brief, that the petition signally fails to state any common-law cause of action, for the obvious reason that it simply pleads legal conclusions, and does not in any manner undertake to set out the **facts constituting the alleged negligence of the engineer at the time and place of accident.**

(*d*) **The Employers' Liability Act of 1908, and as amended in 1910.** It will be observed from a reading of the above petition that no facts are pleaded which bring the case within the purview of the Employers' Liability Act, *supra* (Printed Record, pp. 55-6-7). It is not claimed that there was any defect either in the track, roadbed, rolling stock or other appliances, nor is any negligence claimed except that relating to the personal conduct of the engineer at the time and place

of accident. In order to bring the case within the Employers' Liability Act, *supra*, it was necessary for plaintiff to state in her petition that some defect existed in the defendant's train, rolling stock, appliances, etc., or some part thereof; and that by reason of such defect or defects, the injury complained of was sustained. The petition based on the above statute is clearly insufficient under the rule declared by this Court in the case of

> Henry Brinkmeier, Plaintiff in Error, v. The Mo. Pac. Ry. Co., Defendant in Error (Kans.), Vol. 32, No. 11, pp. 412 and following, Supreme Court Reporter.

In fact, we cannot understand from the plaintiff's petition how the Employers' Liability Act, *supra*, can be applied to this litigation, in view of the allegations in the petition. No duty is pleaded under said act, nor is any violation thereof set out. No facts are pleaded which tend in the least to confer any right of recovery by reason of anything which the railway company did or failed to do, as required by the provisions of said act.

(*e*) The engineer in charge of the train and the deceased, who was his brakeman, were fellow-servants, and no right of action in behalf of the administratrix in this cause can be predicated upon the personal negligence of the engineer. The petition, therefore, showing on its face the relation of the parties aforesaid, fails to state any cause of action under the Employers'

Liability Act, *supra*, under the rule announced in this court in

> Beutler, Admr., Etc., v. Grand Trunk Junction Railway Company *et al.*, 32 Sup. Ct. Reptr. No. 11, p. 402.

In the case just cited, the deceased, Fetta, was at work in the repair yard of the defendant road, and other servants of the railway company (an engine and switching crew) ran a car needing repair from the general tracks into the switch yard, and by their negligence killed him. There was no further relation between the parties than these facts disclosed, and the question was certified whether they were fellow-servants within the rule that would exempt the railroad from liability in that case. Mr. Justice Holmes, in behalf of this court, after reviewing the authorities upon this subject, concluded the opinion as follows (p. 402):

> "It may be that in the State court the question would be left to the jury. * * * But whether certain facts do or do not constitute a ground of liability is in its nature a question of law. To leave it uncertain is to leave the law uncertain. If the law is bad, the Legislature, not juries, must make a change. We answer the certificate, yes."

This Court has heretofore construed the Employers' Liability Act in a number of cases, some of which will be found cited in the opinion of the Kentucky Court

of Appeals (Printed Record, p. 47). An inspection of the cases cited, however, will disclose that in each instance there was a failure upon the part of the railroad company to furnish **safe and suitable appliances,** and that the servant was **injured by reason of some defect which operated as a proximate cause of the injury.** The petition in this case is not predicated upon any **defective appliance** or **instrumentality** which the railway company is required to furnish for the use of its employes. On the contrary, the petition, if based on the above Act, simply refers to the alleged **personal negligence** of the engineer while engaged in the operation of the train.

Is there a cause of action stated in the petition under the Employers' Liability Act of 1908, *supra*? The only allegation in plaintiff's petition (Printed Record, p. 3) which in any manner relates to said Act is the following:

> "That her said husband had been permitted and required by the officers and agents of the defendant to be and remain on duty for a longer period than sixteen consecutive hours next before the aforesaid accident, and in violation of Chapter 2939, Section 2, 34 Statute 1416 of the Acts of Congress of the United States relating to interstate commerce, and being a part of an act entitled 'An Act to Promote the Safety of Employes and Travelers Upon Railroads by Limiting the Hours of Service of Employes Thereon', which became a law on the 4th day of March, 1907; and

also an act entitled 'An Act Relating to the Liability of Common Carriers by Railroad to Their Employes in Certain Cases', which became a law on the 22d day of April, 1908, and that the aforesaid negligent and wrongful acts of the officers and agents of said defendant, and the said violation of the laws of the United States relating to interstate commerce, were the proximate and sole causes of the death of her said husband, and she relies on the laws of the United States made and provided in such cases."

We are at a loss to understand just what office the Employers' Liability Act was intended to fill in this petition. It seems to have been tacked on to the Sixteen-Hour Service Act attempted to be pleaded, without showing any connection between said Employers' Liability Act and any of the facts in the case.

We are not unmindful that this Court, in a number of decisions, has construed the Employers' Liability Act to make the railway company an **insurer** in all cases where a servant in the employ of the railway company is injured by reason of some **defect in the appliances** furnished by the principal, and which defect is the **proximate cause** of the injury complained of. We are likewise aware that this Court, in its recent utterances, has also held that the foregoing is a **continuing duty** upon the part of the railway company; that is to say, it must not only furnish safe appliances and instrumentalities in the **first instance** for

the use of the employe, but it must likewise see that they **remain** in this condition; and, in either case, it is held that a violation of the duty thus imposed makes the railway company an insurer, **if the servant is injured because of the dereliction of this duty on the part of the principal.** But we are not aware of any case which has gone to the extent of construing the Federal Employers' Liability Act of 1908 as abolishing the common law **entirely** in respect to **all** matters between the railway company and its employes.

Section 2 of the Employers' Liability Act of 1908 (pp. 72 and 73 of this brief) reads as follows:

> "Sec. 2. That every common carrier by railroad * * * shall be liable in damages * * * in case of the death of such employe, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, **due** to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

While the foregoing statute should be liberally construed as concerns those who come within its plain provisions, yet, being in derogation of the common law, it should be strictly construed with regard to all other matters which do not come clearly within its purview.

Was it the intention of Congress to abolish the fel

low-servant doctrine in its entirety, as it existed at common law as between railway companies and their employes? If the Employers' Liability Act was so intended and is broad enough to cover this question, then it remains to determine whether the plaintiff in her case has set out facts sufficient to warrant a recovery under the statute as thus construed. **If Congress intended to go to the extent above indicated, it would have been much easier to have said so in general terms, instead of stating the particular facts to which the act should apply.**

Coming down, however, to the case at bar, let us examine to see whether a cause of action has been stated in the petition under the Employers' Liability Act, *supra*. The petition (Printed Record, p. 3), in describing the alleged acts of negligence, reads as follows:

> "Plaintiff now says that at the time of the death of said Etwal McWhirter, deceased, he was employed by and in the service of the St. Louis, Iron Mountain & Southern Railway Company, defendant herein, in the capacity of flagman; that the death of the said Etwal McWhirter resulted from the wrongful acts of the conductor and engineer in charge of the train and locomotive on which the said Etwal McWhirter, deceased, was at the time of his death employed and acting as flagman, as aforesaid, and by the negligence and wrongful acts of the train dispatcher and higher officers, who had control and authority over this plaint-

iff's intestate, of the defendant, St. Louis, Iron Mountain & Southern Railway Company; that the said Etwal McWhirter was killed while so acting as flagman, and at the time he was employed by the St. Louis, Iron Mountain & Southern Railway Company, by being run over and crushed and mangled by the train and locomotive of the said defendant herein; that at the time of the said **accidental** death of the aforesaid Etwal McWhirter the train and locomotive on which he was so employed and on which he was acting in the capacity of flagman for the defendant herein, was engaged in the transportation of freight between the States of Missouri and Illinois, and that the said train and locomotive aforesaid was an interstate train and was engaged in interstate commerce between the aforesaid States of Missouri and Illinois.

Plaintiff further says that her cause of action herein arose against the defendant by reason of the wrongful and negligent death of her aforesaid husband, Etwal McWhirter, which was occasioned by the negligent and wrongful acts of the officers and agents of the defendant as aforesaid in managing and operating its train while her husband was employed by the defendant St. Louis, Iron Mountain & Southern Railway Company as flagman on a train and locomotive engaged in interstate commerce as aforesaid."

It will be observed from this quotation that not a single issuable fact is presented. The petition nowhere attempts to **set out any actual facts constitut-**

ing negligence, nor from which negligence can be inferred. Aside from the **legal conclusions** drawn by the pleader, there is not a scintilla of negligence alleged in the petition in this respect. We have heretofore demonstrated, under the authorities cited upon pages 6 *et seq.* of this brief, that a petition of this character states no cause of action, tenders no issue of fact, and is demurrable upon its face. We insist, therefore, that the petition absolutely fails to state any cause of action under the Employers' Liability Act.

(*f*) **Hours of Service Act.** Under the preceding paragraph we have set out that portion of the petition which relates to the Hours of Service Act, and insist that no cause of action has been stated in the petition on account of the alleged violation of said Act. The petition pleads that the deceased had been permitted by the defendant to remain on duty for a longer period than sixteen **consecutive** hours before the accident complained of, in violation of the above law. It then charges:

> "That the aforesaid negligent and wrongful acts of the officers and agents of the said defendant, and said violation of the laws of the United States relating to interstate commerce were the proximate and sole causes of the death of her said husband, and she relies on the laws of the United States made and provided in such cases."

Under the rule laid down by this Court in

Brinkmeier v. The Mo. Pac. Ry. Co., 32 Sup. Ct. Reptr. 412,

in order to have given plaintiff a cause of action under this statute, it would have been her duty to have alleged a state of facts showing a liability thereunder. In other words, even if a **civil right of action** should be given under this statute—which we deny—yet in order to base a right of action upon the alleged violation of the Act, the pleader should not only plead said violation, but should point out with particularity the **causal connection between said alleged violation and the injury or death complained of.** It is true that a man may be overworked five minutes and yet, if during said five minutes he should be struck by lightning or be accidentally killed by a third party, the violation of the Sixteen-Hour Law could not be considered the **proximate cause of his death.** Therefore, in order to have stated a complete right of action, the petition should have averred that because of his overwork plaintiff's intestate became so fatigued or exhausted that he was rendered incapable of performing the duties which he was called upon to perform.

Lloyd v. Railway Co., 66 S. E. 604 (N. C.);

Smith v. A. T. & S. F. Ry. Co., 87 S. W. 1052 (Texas);

Kerlin v. C. & N. W. Ry. Co. *et al.*, 128 N. W. 548 (Iowa).

Although deceased may have been worked five minutes overtime, yet if he was in no manner exhausted, fatigued or otherwise inconvenienced by reason of such overwork, and was killed by an **independent, intervening act alleged to have been occasioned by the personal negligence of the engineer,** the violation of the Sixteen-Hour Law, *supra*, could not be held as the **proximate cause** of his injury, nor could the railway company be held as an **insurer** under said law.

The Kentucky Court of Appeals in its opinion (Printed Record, p. 47) refers to a number of decisions where the railway company was held as an **insurer** for failure to furnish safe cars and other appliances, but in every case in which the rule was thus announced it clearly appeared that the **defect complained of was the sole, direct and proximate cause of the injury to the employe.** The rule enunciated in the cases last referred to can have no application to the Sixteen-Hour Law, *supra*, unless the facts would warrant the Court in saying that the injury resulted as a **direct or proximate cause** from the violation of said law.

There is nothing in the petition to indicate in the **slightest** degree that the violation of the said Sixteen-Hour Law had anything whatever to do with the death of plaintiff's husband. The petition, therefore, in this respect fails to state a cause of action.

We conclude this proposition with the firm belief that, in a case of this character, in which the plaintiff

relies upon **two statutes in derogation of the common law**, her petition should not be based solely upon **legal conclusions**, and that being so based, no cause of action has been disclosed in the petition on file in this cause.

SECOND SPECIFICATION OF ERROR.

II.

The Kentucky Court of Appeals erred in holding that there was any legal evidence offered at the trial, either proving or tending to prove that the defendant's conductor and engineer, or either of them, were guilty of any negligence whatever at the time deceased was killed.

We have endeavored to show in the preceding proposition one that no cause of action is stated in plaintiff's petition either under the common law, under the Employers' Liability Act of 1908, or under the Sixteen-Hour Law. We shall now attempt to demonstrate that there was not a **scintilla** of evidence either **proving** or **tending to prove** any negligence whatever as against the engineer at the time and place of accident.

The **plaintiff**, in her own behalf, introduced Engineer H. O. Guess (Printed Record, pp. 19, 20 and 21) as a witness, and through her counsel, examined him, as follows (Printed Record, p. 20):

> Q. 21. Just detail the manner as it occurred, as you know it.
>
> A. 21. As I came into Wolf Lake, when I

whistled for town, brakeman asked me if I were going to head in at Wolf Lake. I told him yes, that we had to get in on account of the Sixteen-Hour Law. He got up, went out at the front window on the left side of the engine along the footboard, and the next thing I seen was the operator at Wolf Lake very much excited in giving a stop signal. I stepped off of the engine, asked him what was the matter. He said, "My goodness, you have run over the brakeman". I went looking for him, found him under the left tank wheel, cut in two.

Q. 22. Brakeman referred to here was whom?

A. 22. McWhirter.

Q. 23. How was your train known, by what name?

A. 23. Extra South 503.

Q. 24. Did you know this brakeman was in front of the engine?

A. 24. No, sir.

Q. 25. Did you see him go out of the cab window?

A. 25. I seen him go out of the cab window. That is all.

Q. 26. What did you suppose he went out of the cab window for?

A. 26. He is supposed to get out there to open the switch. I suppose that is what he went out there for.

Q. 27. Was it his duty to throw the switch in front of the window or not?

A. 27. No, sir; it wasn't his place to throw it in front of the window. He wasn't supposed to go out on that pilot.

This witness also said as a part of his examination in chief (Record, p. 21):

> **"I was not working steam when he was killed. The engine was drifting. Understand, shut off, there would be no leak there."**

An inspection of the photographs of this locomotive taken from the fireman's side and also from the engineer's side (Printed Record, pp. 58-9) will disclose that when the engineer was at his post on the **right**-hand side of the engine he could not see the deceased as he got out of the front window on the **left** side and went forward along the running board of the locomotive to the pilot, nor could he have seen the deceased any more until the latter was from thirty to forty feet in front of the engine.

Telegraph Operator Roberson likewise testified in behalf of plaintiff in answer to question 8 as follows (Printed Record, p. 23):

> "I saw a man leave the cab window and come down the left running board and came down to the pilot, and as it was nearing the switch he left the pilot and struck the ground running, and the next I saw, he fell face downward between the rails. I next saw him on his hands and knees. After that I turned my eyes to the engineer, and did not see him any more, giving the engineer a stop signal. When he came to a stop, I told the engineer something, but I do not remember what I told him, but that was the last I saw of the

brakeman until he was taken from under the tender of the engine."

No witness undertakes to describe the distance between the deceased and the locomotive at any time after he got off the pilot, **but the engineer, who was evidently looking down the track, saw the telegraph operator Roberson signal to him and stopped his train within a short distance after receiving such signal.** Witness Roberson testified (Record, p. 24):

> Q. 3. How far did the train run before the engineer stopped it, after you notified him of this trouble?
>
> A. 3. I suppose about **the length of an engine,** maybe not quite so far, maybe a little farther.

From an examination of this evidence it will be seen that **the engineer was looking in front,** was at his post of duty, saw the signal given by the operator, **but did not see deceased.** His train was drifting along slowly and only ran a short distance after the signal was given, which would indicate that it was under perfect control. The **plaintiff,** in the most positive manner possible, **proved by the engineer that he did not know deceased was in front of the locomotive, and that he never saw him from the time he left the cab window until after he was killed.** Upon this state of facts, how can it be said that the engineer was guilty of negligence in running over the deceased?

It would not have been **competent** for the defendant company to have introduced **expert** evidence to show **that it was unsafe for deceased to travel down the track in front of a moving locomotive, when he could have walked outside the rails and been in a place of safety.** The testimony of the engineer is **uncontradicted, and given at the instance of plaintiff,** to the effect **that it was not the duty of deceased to go out on the pilot and set the switch in that manner** (Printed Record, p. 20). The **physical** facts, as disclosed by an inspection of the photographs of the locomotive, clearly corroborate the testimony brought out by plaintiff from the engineer in respect to the foregoing matters.

It cannot be **presumed** that the engineer would have run over his companion if he had known the latter was in front of the locomotive and in a place of danger. On the contrary, the engineer, **being unaware of the presence of deceased in front of the locomotive, had the right to assume that deceased would not place himself in a perilous position, but would rather travel along the track in a safe place.**

I Bailey on Personal Injuries Relating to Master and Servant, 1121 *et seq.* (1st Ed.);

Gilbert v. Railway Company, 128 Fed. Rep. 534, *l. c.* (Minn.);

Pa. Co. v. Shaughnessy, 122 Ind. 588, s. c. 23 N. E. 675;

Moore v. Railway Company, 146 Mo. 572;

Smith v. F. N. Box Co., 193 Mo., *l. c.* 737;

Hirsch v. Bread Co., 150 Mo. App., *l. c.* 174;

I White on Personal Injuries on Railroads, Sec. 140, and cases cited.

It is elementary law that, where a plaintiff produces a witness and proves by him **uncontradicted facts at the trial, it cannot be presumed by the plaintiff in the subsequent history of the case that her own testimony is false.** The **deposition** of the engineer was on file, and the plaintiff, in reading the same to the jury, necessarily knew that the engineer testified therein, **that he did not know deceased was in front of his locomotive, and that he never saw deceased any more until after he was killed. Having produced this testimony as a part of her case in chief, and there being no contradiction of the same, it must be taken as true by the Court in disposing of the case.**

We, therefore, in great confidence insist that there was not a shadow of evidence adduced at the trial which either **directly** or **inferentially** tended to show that the engineer at the time and place of accident was guilty even of the **slightest** negligence. On the contrary, the evidence clearly shows that deceased **unnecessarily and with full knowledge of the danger to which he subjected himself in passing in front of a moving locomotive was the architect of his own misfortune.** The record discloses **that he was an experienced railroad man, and must have understood the risk which he voluntarily assumed by proceeding in front of a moving locomotive to set the switch, instead of passing beside the rails in a place of safety.**

It is insisted by the plaintiff in error that there was

no negligence whatever shown by the plaintiff so far as the engineer was concerned, and that the judgment cannot be sustained, whether this be considered a proceeding at **common law**, under the **Federal Employers' Liability Act or under the Sixteen-Hour Law.**

THIRD SPECIFICATION OF ERROR.

III.

The Kentucky Court of Appeals erred in sustaining the trial court as to the legality of plaintiff's instruction "C" given at her instance (Record, p. 91).

Said instruction "C" reads as follows:

"C".

> "The Court instructs the jury that if you shall believe from the evidence that the train on which the decedent, Etwal McWhirter, was employed at the time of the accident which caused his death was engaged, or employed, in interstate commerce, and if you shall further believe from the evidence that the death of the said Etwal McWhirter resulted from the negligent and wrongful acts of the conductor, engineer, or servants of the defendant, superior in authority to the said Etwal McWhirter, you will find for the plaintiff such damages as you may believe from the evidence that she has sustained, not to exceed, however, the sum of $25,000."

This instruction is erroneous because the petition

fails to state a cause of action, because there is no legal evidence shown with regard to the alleged negligence of defendant's servants at the time and place of accident, and because, by said instruction, the jury were given a roving commission to convict defendant of a violation of any supposed duty, whether pleaded or otherwise, and were not required to find such facts if they existed, as would have rendered defendant liable under either of the acts of Congress pleaded in the petition, or under any other statute or law.

We do not recall ever to have seen an instruction so broad and sweeping in its character as plaintiff's instruction "C". The jury are nowhere required to find that the defendant owed to deceased any duty which was violated. This instruction does not attempt to confine the jury to any of the facts pleaded in the petition; it leaves the jury to set up its own standard as to what constitutes negligence, and warrants a recovery upon any ground which they may see fit to consider, whether within the purview of the pleadings or otherwise. In short this instruction permitted the jury to consider any supposed act of negligence on the part of the conductor, the engineer or any other servant of the defendant from the time plaintiff's intestate left Illmo, Missouri, on the evening of February 22d, until he was killed the following morning. From the reading of this instruction, no court could approximate what

view the jury took of the testimony, nor upon what ground of negligence they based their verdict.

In a case of this character, where a right of action is asserted which did not exist at common law and which should be strictly construed, the instruction should be so framed as to define the duty which the railway company owed to the deceased, and then the jury should be directed that, if they believed from the evidence that such duty had been violated and injury followed, they should respond accordingly. But, in this instruction "C" no guide is given to the jury in respect to any matter connected with the case. This instruction is complete within itself and authorizes a verdict in behalf of the plaintiff without reference to any other facts or circumstances in the case. We therefore insist that it is clearly erroneous and cannot be defended from any point of view.

FOURTH SPECIFICATION OF ERROR.

IV.

Federal Employers' Liability Act of 1908 (Record, p. 91). The Kentucky Court of Appeals erred in construing the above act to authorize a recovery on behalf of defendant in error upon the ground that the railway company was liable either as an insurer or otherwise.

As heretofore shown, this court has held the railway company to be an insurer where it fails to furnish safe

appliances, etc., and such failure has been the direct and proximate cause of injury to an employe. The Kentucky Court of Appeals said (Record, p. 43):

> "The record fails to show any negligence on the part of the conductor, other than his act in continuing the train crew on duty longer than sixteen consecutive hours. But there was some evidence tending to show negligence on the part of the engineer, from which the jury had the right to determine whether it was a **concurring** cause of the intestate's death."

We have endeavored to point out heretofore that there was not even a scintilla of evidence tending to show negligence on the part of the engineer, and that the uncontradicted testimony given on behalf of the plaintiff, in unequivocal terms, disclosed that the engineer was not aware of the presence of plaintiff's intestate in front of the locomotive at the time of the accident.

It appears from the above quotation that the Court of Appeals was of the opinion that the Employers' Liability Act of 1908 could afford a basis of recovery, if the facts arising thereunder were sufficient to show that they concurred with the alleged violation of the Sixteen-Hour Law. The most casual examination of the Employers' Liability Act of 1908 (Record, pp. 54 to 56), and especially section 3 thereof, will disclose that the term "**contributing**" as used therein applies

solely to the negligence of the employe, and that said Act does not in any manner undertake to confer a right of action where the alleged negligence of the **defendant** simply **concurred** with some other act in producing the injury. In other words, the Employers' Liability Act, whether applied to the equipment of the train or to the alleged negligence of the engineer, could only confer a right of action **where the alleged violation of said Act directly and proximately produced the injury.**

Under **ordinary** conditions, if the **deceased** by **negligent conduct contributes** in any manner to produce his own injury, his contributory negligence precludes a recovery. But, in dealing with the **negligence of the defendant,** it must appear that such **negligence was the proximate cause of the injury,** and it is not sufficient simply to prove that it **contributed** thereto.

But we have demonstrated heretofore that no cause of action is stated in the petition under the Employers' Liability Act, nor does the record contain any facts which would warrant a recovery thereunder. The uncontradicted testimony brought out by plaintiff **excludes** the idea, **that the engineer knew deceased was on the track in front of his engine, and his positive evidence to the effect that he was unaware of the presence of the deceased cannot afford a right of recovery in behalf of plaintiff.**

On the other hand, under the Employers' Liability Act, regardless of the questions either of **contributory**

negligence or assumption of risk, the undisputed facts disclose, that the deceased was the architect of his own misfortune, in that he deliberately and unnecessarily, without invitation or suggestion from anyone, went down on to the pilot of the locomotive and thence between the rails in front of a moving train, although he had full knowledge of the danger to be apprehended from such action on his part. He was not only guilty of negligence under such circumstances, but his negligence was the direct and proximate cause of his own death, without reference to any of the alleged acts charged against the defendant in this cause.

FIFTH SPECIFICATION OF ERROR.

V.

The Kentucky Court of Appeals erred in holding that the contributory negligence of the deceased and his assumption of risk were not available to defendant as defenses, nor by way of diminution of damages.

It will be remembered that there is only one count in the petition. There are mingled in said count attempted charges of negligence under the Employers' Liability Act and the Sixteen-Hour Service Act, and we are now told that there was also included therein a common-law cause of action. If this suit were predicated upon a common-law cause of action, contributory negligence and assumption of risk would be complete defenses. If the action is one under the Employ-

ers' Liability Act and does not arise from defective appliances but should be **based** upon the **personal negligence** of the **engineer** in managing the train, then section 3 of the Employers' Liability Act (Record, p. 55) requires **that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employe.**

The Court of Appeals refused to recognize this principle, and upheld the trial court, although no instruction was given upon this subject, and although plaintiff's instruction "C", *supra*, authorized the jury to ignore this element in passing upon the case.

Again, the **Sixteen-Hour Service Act** does not, in terms, authorize a recovery for damages in a **civil** action. It is in derogation of the common law. As heretofore suggested, at common law, the personal right of action dies with the person. So that there could be no **common-law right of action** against the railway company for working deceased more than sixteen consecutive hours, and especially, unless it had appeared that he was compelled to work and received an injury **attributable** thereto. If then, this Sixteen-Hour Law be strictly construed, it does not undertake to refer to any other act, but is complete within itself. It nowhere attempts to shut off the defenses either of **contributory** negligence or **assumption** of risk.

The provisos contained in section 3 (Record, p. 58) clearly show that the railway company is not an **in-**

surer under said Act, nor does it in any manner cut off any **common law rights** not coming within the purview of said Act. In other words, if the Act be strictly construed, it would give no right of action for damages at all, as Congress had the power to withhold or confer such right in the passage of a law of this character in contravention of the common law. We therefore insist that under the Sixteen-Hour Law the defense of **contributory** negligence, as well as that of **assumption** of risk, was available to the defendant.

Smith v. A., T. & S. F. Ry. Co., 87 S. W. 1052 (Tex. C. Ct. of App);

Kerlin v. C. & N. W. Ry. Co., 128 N. W. 548 (Iowa);

Lloyd v. Railway Company, 66 S. E. 604 (N. C.)

In each of the cases last cited the petition sought to predicate a recovery by pointing out the fact **that the injured party had been compelled to work more than sixteen hours, and that by reason thereof he was exhausted and unable properly to perform his duty at the time of the accident.** Even in this class of cases, however, it was held no recovery could be had under the circumstances detailed in this record. In the case at bar the **deceased was neither requested nor directed by anyone to go out and set the switch, much less to perform this duty in the manner in which he did, by walking in a known place of danger between the rails in front of a moving locomotive, when he could have**

walked in safety by the side of the track and done his work equally as well.

It is insisted, therefore, that the defenses of **contributory** negligence and **assumption** of risk are available to the defendant, if any right of action can be predicated upon the alleged violation of the Sixteen-Hour Law.

SIXTH SPECIFICATION OF ERROR.

VI.

The Kentucky Court of Appeals erred in holding that plaintiff was entitled to recover by reason of the alleged violation of the Sixteen-Hour Service Act, although the deceased himself was assisting in its violation when the accident occurred, if said statute was violated at said time.

(See authorities cited under last preceding specification.)

SEVENTH SPECIFICATION OF ERROR.

VII.

The Court of Appeals erred in refusing to hold that, on the undisputed facts disclosed by the record, the deceased lost his life by reason of his own voluntary acts, without any reference to the alleged wrongful and negligent acts of the defendant or its servants.

The authorities cited under specification five, *supra*, clearly cover this point. The deceased was an experi-

enced railroad man. Instead of getting off at a safe place on the side of the locomotive, he voluntarily went out on the pilot, and although he knew the engine was drifting in the direction in which he intended to start, and that if he should stumble or fall he was likely to be run over, he nevertheless got off the engine and proceeded in front of the moving train. He also well knew that, by virtue of the physical construction of the locomotive, he was not within the line of vision of the engineer until he had gotten within a certain distance of the engine, and that the engineer could not by any possibility see him if he walked too close to the engine. Such being the case, and the engineer being unaware of the presence of McWhirter in front of the locomotive, where the engineer's testimony showed that he had no right to be, it should, in our opinion, be perfectly clear and manifest to any reasonable mind **that the death of plaintiff's husband resulted solely from his own acts, and that, regardless of any alleged violation of the Sixteen-Hour Law, the conduct of the deceased at the time of the accident operated as an independent, intervening cause, directly and proximately producing his death.** The Court should, therefore, in our opinion, have directed a verdict for the defendant.

EIGHTH SPECIFICATION OF ERROR.

VIII.

Hours of Service Act (Record, p. 57). The Kentucky Court of Appeals, as well as the trial court, erred in holding that plaintiff was entitled to recover by reason of the alleged violation of the Hours of Service Act by the defendant, and especially erred in holding that defendant was an insurer of the safety of plaintiff's husband at the time of the accident.

We have endeavored to show heretofore that no valid cause of action is alleged in the petition with respect to the violation of the Sixteen-Hour Law, *supra*. We have endeavored to show from the facts disclosed in the record that there was no **causal connection whatever** between the **alleged violation of said Sixteen-Hour Law and the death of plaintiff's intestate.**

The Court of Appeals held, however, that as the service of deceased commenced at 3:30 on the afternoon of February 22, 1910, and as he was killed at 7:35 on the following morning, he had been required to work more than sixteen **consecutive** hours, and that by reason thereof the railway company became an **insurer** as to his safety during the five minutes exceeding said sixteen hours, **although there was no causal connection between the alleged violation of the Hours of Service Act and the death of plaintiff's hus-**

band. In other words, the Court **held that, because the deceased was permitted to work five minutes over the sixteen hours, his widow was entitled to recover, if during that period, to-wit, the five minutes, he was run over and killed by the engine, and that the railway company was an insurer under such circumstances.**

In its opinion the Court of Appeals said (Record, p. 43):

> "In thus requiring of the intestate more than sixteen consecutive hours of service, albeit the excess of service over the sixteen hours was but five or seven minutes, appellant violated the statute, *supra*, and as the death of the intestate from the act of its engineer complained of occurred while he was engaged in the required continuous service and after the expiration of the sixteen consecutive hours allowed by the statute, there seems to be no escape from the conclusion that the act of appellant in thus extending his service beyond the statutory limit was negligence *per se*, to which the intestate's death must, **as a matter of law**, be attributed, and, if so, the right of appellee to maintain this action cannot be questioned."

This presents the whole question in a nutshell. In other words, according to the theory of the Court of Appeals, **if deceased had been at work for sixteen consecutive hours and was thereafter permitted to work five minutes overtime, his legal representative**

would be entitled, under the Sixteen-Hour Law, to recover damages on account of his death, although he may have been killed during said period of five minutes by lightning or by the act of some third party. In short, the Court of Appeals, in the foregoing quotation, **eliminates** every other element in the case, and holds squarely **that the widow is entitled to recover if her husband was worked five minutes overtime and was killed by the engineer, even though the latter may not have been guilty of any negligence.** This doctrine is so drastic as to shock the sense of right and justice.

The cases relied upon under the Safety Appliance Law, where defective instrumentalities were supplied, cannot be authority in a case of this character, where the alleged violation has no causal connection with the injury complained of.

Ives v. Ry. Co., 94 N. E. 431 (N. Y.)

A number of States have statutes which require railway companies at all public highway crossings to sound the whistle or ring the bell of their locomotives at a given distance before passing over such crossings. Penalties are usually provided in these statutes for the violation thereof. Yet it has been uniformly held that if an employe or any other person be injured at a crossing, **and such person has timely notice that the train is approaching, no right of recovery can be had**

for an injury because of the failure to give the statutory signals.

Hutchinson v. Railway Co., 161 Mo. 246;
Murray v. Railway Co., 176 Mo. 189, *l. c.*;
I. C. Ry. Co. v. Willis' Admr., 97 S. W. 21 (Ky.) and cases cited;
Baltimore, Etc., Ry. Co. v. Abbegglen, 84 N. E. 566 (Ind.);
Pakalinsky v. Railway Co., 82 N. Y. 424.

These cases in the clearest manner possible assert the doctrine that, although it may be **negligent** to run over a public highway **without ringing the bell or sounding the whistle, yet if an employe or pedestrian be injured at such crossing who has seen the train approaching in time to avoid the danger and undertakes to act on his own responsibility—as the deceased did in this case—by crossing the track in front of a moving train, he cannot predicate a right of recovery upon the failure of the railway company to perform such statutory duty, when the violation of the statute was not the proximate cause of his injury.**

We shall set out hereafter, in a separate assignment, the full list of authorities holding that in cases of this character, as well as all others, **the alleged violation of any law must be the proximate cause of an injury before an action can be predicated thereon.**

NINTH SPECIFICATION OF ERROR.

IX.

The Kentucky Court of Appeals erred in sustaining the trial court in holding that plaintiff's instruction "I" (Record, pp. 17-18, 92) properly declared the law.

Said instruction "I" reads as follows:

"I."

> "The Court further instructs the jury that if you shall believe from the evidence that the said Etwal McWhirter had been permitted, or required, to be or remain on duty continuously for more than sixteen consecutive hours next before the accident which caused his death, then the defendant was negligent, and liable in damages for said injury and death of Etwal McWhirter, if you shall believe from the evidence that the permitting or requiring the said Etwal McWhirter to be, or remain, on duty continuously for more than sixteen consecutive hours next before his death in any way **contributed** to the said accident and death, you will find for the plaintiff such damages as you may believe, from the evidence, she has sustained by reason of his death, not to exceed the sum of $25,000."

We have pointed out under Specification Eight, *supra*, that the Court of Appeals in its opinion (Rec., p. 43, and this brief, p. 51) practically held that, upon the facts disclosed by the record, the railway company

was an insurer under the Sixteen-Hour Law, and that plaintiff was entitled to recover by reason thereof as a matter of law. We have attempted under the preceding proposition to show that this conclusion of the Court is wholly unauthorized and is in conflict with elementary principles.

Said instruction "I", however, is clearly erroneous, because it authorized the jury to return a verdict in behalf of plaintiff, if they believed that the alleged violation of the Sixteen-Hour Law **in any way contributed** to the accident. As heretofore shown, there is nothing either in the Employers' Liability Act or in the Hours of Service Act which confers upon a plaintiff a right of recovery in any case simply by showing that the negligent act complained of in some way **contributes** to the injury. In order to sustain a recovery, it must appear that the negligent act complained of **caused** and not simply **contributed** to the injury.

Said instruction is likewise erroneous, because there was no evidence adduced at the trial, which either proved or tended to show that deceased remained on duty sixteen consecutive hours from the time he left Illmo at 3:30 p. m., February 22, 1910, and the time of his death the following morning at 7:35.

We shall undertake to demonstrate that the facts in the case at bar do not show sixteen hours consecutive service on the part of the deceased. The evidence dis-

closes, without contradiction, that the train left Illmo, Missouri, at 3:30 p. m., February 22, 1910 (Rec., p. 26); that there were **nine empty cars** in the train when it left Illmo (Rec., p. 19); that they were to go to Bush, Illinois, the terminus of their route, for the purpose of obtaining coal, which was to be returned to Illmo (Rec., p. 19). They got to Bush about 11:30 p. m. on February 22, 1910 (Rec., p. 26). According to Loper's testimony the train crew remained at Bush about an hour and thirty minutes (Rec., p. 26), and, according to the testimony of Engineer Guess, they remained there about an hour (Rec., p. 19). The distance from Bush to Wolf Lake was about thirty-five miles (Rec., p. 37). The record then discloses that the train crew must have left Bush for Wolf Lake at 12:30 or 1:00 o'clock a. m. on February 23, 1910, **with six hours and thirty minutes in which to make thirty-five miles and still be within sixteen hours from the time they left Illmo.** The undisputed evidence shows that the train was in good condition in every particular and that there was nothing wrong with the track. As the Safety Appliance Act requires these freight cars to be supplied with air, and as the train was shown to be in good condition, the presumption is, in the absence of any evidence to the contrary, that the locomotive and nine cars were properly equipped with all the modern improvements. Keeping in mind the fact that the train crew were leaving Illmo at 3:30 p. m.

for Bush, with empty cars, it will readily be seen that there was no necessity for the deceased to have performed any duty from the time he left Illmo at 3:30 until he arrived at Bush at 11:30. Under ordinary circumstances, local freight trains and other trains may have local work to do along the route, and, in such cases, it will be presumed that the brakeman is engaged in performing his duty, but, in the case at bar, with a train of empty cars, there was absolutely nothing for the deceased to do during the eight hours which elapsed between the time he left Illmo and his arrival at Bush.

The plaintiff had alleged in her petition that deceased was permitted to remain on duty more than sixteen **consecutive** hours. This allegation of the petition was controverted by the answer. The plaintiff was put upon her proof at the trial. There is not a syllable of evidence in the record which shows that deceased performed one solitary piece of work, or that he was even at his post of duty ready to perform the same, if anything were required, from the time he left Illmo until he arrived at Bush. Hence during the said eight hours, there was no reason why he should not have taken rest and sleep, if he desired it. At any rate, the plaintiff signally failed to make out a case of consecutive service as required by this highly penal statute under which she is proceeding.

The conductor and engineer were placed upon the

witness stand by plaintiff, and, with the foregoing allegation challenged in the answer, it was plaintiff's duty to prove by one or both of these witnesses continuous service on the part of the brakeman, or at least to show facts from which such service could be inferred. Plaintiff having failed to do this, the case was submitted to the jury upon mere conjecture as to whether the deceased was engaged in any duty during the eight hours, *supra*.

TENTH SPECIFICATION OF ERROR.

Instruction "I" Continued.

X.

As heretofore contended, the Hours of Service Statute is in derogation of the common law, and does not, in terms, confer any right of action for damages on account of its violation. At any rate, it should be strictly construed. In the giving of the above instruction, the jury were permitted to speculate and conjecture as to whether the deceased had performed sixteen hours of consecutive service, and without any evidence whatever on which to base their finding. This was clearly in violation of legal principles.

Louisville Gas Co. v. Kaufman, S. & Co., 105 Ky. 156, s. c. 48 S. W. 434, and cases cited;

L. & N. Ry. Co. v. Guest's Admr., 106 S. W. 817 (Ky.);

Warner v. Railway Co., 178 Mo. 134 *l. c.*, and numerous cases cited.

Therefore, there was no legal evidence produced at the trial sufficient under the law to warrant the submission of the case under the Sixteen-Hour Law, for the reason that plaintiff signally failed to show sixteen hours **consecutive** service upon the part of the deceased.

(*a*) Said instruction "I" is likewise erroneous, because it authorized a verdict in behalf of plaintiff, if deceased was permitted to work five minutes over the sixteen hours, and this in any way **contributed** to the accident. Said instruction ignored the **provisos** contained in Section 3 of the Hours of Service Act (this brief, pp. 77-8), which read, as follows:

> "The provisions of this Act shall not apply in any case of casualty or unavoidable accident, or the act of God; nor where the delay was the result of a cause not known to the carrier or its officers or agent in charge of such employe at the time said employe left a terminal, and which could not have been foreseen."

The evidence set out in the record is clear, to the effect, that the freight train arrived at Bush at 11:30 p. m. on February 22, 1910. The evidence is likewise positive, that the train left for Wolf Lake either at 12:30 or 1 o'clock on the morning of the 23d, when the accident occurred (Rec., pp. 19 and 26). It is uncontradicted that the distance from Bush to Wolf Lake was thirty-five (35) miles (Rec., p. 37). The

accident occurred at 7:35. If the train had arrived at Wolf Lake at 7:30, it would have been within the sixteen hours from the time the crew left Illmo at 3:30 the evening before.

It is contended by the defendant that, under the above provisos, the officers of the railway company were not guilty of negligence or of a violation of the Sixteen-Hour Law in undertaking to have the train reach Wolf Lake within the six and a half or seven hours which elapsed between the departure of the train from Bush and its arrival at Wolf Lake. In other words, the train crew, with a train composed of only 8 or 9 cars, had six and a half or seven hours within which to make thirty-five (35) miles. The train and rolling stock were in good condition and competent men were in charge. No reason was shown why this train could not have traveled as much as six miles an hour. The railway company, therefore, had the right **to anticipate**, that the distance of thirty-five miles could easily be made within the time allotted, and no fault can be imputed to it because the train arrived at Wolf Lake five minutes after the expiration of the alleged sixteen-hour period.

(*b*) Said instruction "I" authorized the jury to find for the plaintiff, if they believed that the alleged violation of the Sixteen-Hour Law **contributed** to the death of plaintiff's intestate. In other words, the jury were instructed that, if they found from the evidence

that plaintiff's intestate had been on duty for five minutes over sixteen hours, and this fact **contributed** to his injury, they should return a verdict for plaintiff, **even though the deceased had voluntarily assumed a position of danger in front of a moving locomotive when he could as well have taken a safe place by the side of the track and performed his duty.**

By the use of the word "**contributed**" in said instruction, the jury might have concluded, that if plaintiff's intestate had not been required to remain on duty during said five minutes, the accident would not have occurred. In this way, they might have reached the conclusion, that the act of defendant in permitting deceased to work during said five minutes **contributed** to his death, **although his own act in walking in front of the train was the direct and proximate cause thereof.** Therefore, as said instruction "I" authorized a recovery within itself and was clearly erroneous, the cause should be reversed.

ELEVENTH SPECIFICATION OF ERROR.

XI.

The Kentucky Court of Appeals erred in holding that the provisos mentioned in Section 3 of the Hours of Service Act do not apply to the case at bar because the answer of appellant did not plead same (Rec., p. 51; see also Rec., p. 93).

The Hours of Service Act is not a private statute, but covers the entire United States. It was not necessary for plaintiff to plead said Act, provided the facts stated in the petition came within the purview thereof. On the other hand, neither was it necessary for the defendant in its answer to set up said Act, but simply to put in issue the averments of plaintiff's petition and to plead any other matters coming within the purview of said law.

As heretofore stated, the plaintiff, in her petition charged that the deceased was permitted and required to work more than sixteen **consecutive** hours. The answer **denied** this, and specifically pleaded that plaintiff's intestate at the time and place of accident went out on the running board on the left side of the engine, from thence down on to the pilot and to the ground to run ahead and throw the switch, and, **while running or starting to run, he fell in front of the engine and was killed; that the killing was an accident and was unavoidable.** This allegation of the answer was clearly within the purview of said Section 3 of the Hours of Service Act, and, on the undisputed facts as disclosed in the record, the Court could properly have declared, as a matter of law, that the proviso defeated any right of recovery upon the part of plaintiff.

We insist that the **proviso** above referred to is simply a **construction of the Act itself,** and, in express

terms, stipulates that said Act shall not apply under the circumstances **detailed in such proviso.**

In re Day, 181 Ill. 73, s. c. 50 L. R. A. 521;
Ga. Banking Co. v. Smith, 128 U. S. 181;
Carter-Webster & Co. v. U. S., 74 C. C. A. 397, *l. c.* (Md.);
Baggaley v. P. & L. Sup. Iron Co., 33 C. C. A. 202 (Mich.).

In the case of

In re Day, 50 L. R. A. 521,

it is said:

> "Now the office of a proviso is to qualify or limit the enactment itself, and not to enlarge the enacting clause. 'The office of a proviso, generally, is either to except something from the enacting clause (to qualify) to restrain its generality, or to exclude some possible grounds of misinterpretation of it as extending to cases not intended to be brought within its purview.' Potter's Dwarr. Stat. 118, note 11. **It is intended to qualify what is affirmed in the body of the act, section, or paragraph preceding it.**"

In the case at bar, however, all of the evidence in respect to this matter is before the Court, and was given without objection. We see no difference in principle between the Court's considering the facts, which, as above stated, were given without objection as a part of plaintiff's case, and that class of cases in which, although contributory negligence is required to be

pleaded, as an affirmative defense by the defendant, yet it is held that where such contributory negligence **is shown by the testimony offered in behalf of plaintiff,** the Court will determine the question in the same manner as though it had been affirmatively **pleaded** by the defendant.

Hudson v. Railway Co., 101 Mo. 13 et seq.

In the Hudson case, *supra*, the plaintiff alleged in his petition that he was injured on account of the **negligence of the defendant, without any fault or carelessness on his part.** The defendant denied this allegation. It was claimed in the Supreme Court on behalf of the defendant, **that it was unnecessary to plead contributory negligence, as the plaintiff had tendered the issue in his petition, and defendant had denied that he was exercising due care at the time.** The Court held that this doctrine was not sound, **as it was not necessary for the plaintiff to plead facts showing due care,** and hence it was necessary for the defendant,under ordinary circumstances, to plead affirmatively such facts as would indicate contributory negligence on part of plaintiff. The Court, however, in disposing of the case, announced the rule of law to be as follows:

> "But while contributory negligence as a matter of defense has to be pleaded in order for a defendant to avail himself of it, by the introduction of evidence to sustain that issue, yet it does not thence follow that if the plaintiff's own testimony

shows circumstances of contributory negligence which absolutely defeat his right of action and disprove his own case, that the defendant is not at liberty to take advantage of such testimony though produced by the adversary. **On the contrary, it is well settled in this State as well as elsewhere that such advantage may be taken of the plaintiff's testimony, regardless of whether the special defense be pleaded or not.** Milburn v. Railroad, 86 Mo. 104, and cases cited; Schlereth v. Railroad, 96 Mo. 509."

We have attempted to demonstrate heretofore that the deceased lost his life purely because of an **accident**, without any fault on the part of any other person contributing thereto, and that hence the Sixteen-Hour Law, *supra*, has no application. Especially is this true, as the answer, in express terms, claimed that the death of deceased was due to an **unavoidable accident.** We have likewise attempted to demonstrate that on the undisputed facts the above Act has no application, because the railway company **was not bound to anticipate, when its servants left Bush, that Wolf Lake, which was only thirty-five miles off, could not be reached in six hours and a half.**

TWELFTH SPECIFICATION OF ERROR.

XII.

The alleged violation of the Sixteen-Hour Law was not the proximate cause of the death of plaintiff's intestate.

(See authorities cited under Brief of Argument.)

Without waiving any of the other errors assigned, we think the foregoing specifications cover the main questions presented by the record in this cause.

It is earnestly contended by the plaintiff in error that, on the undisputed facts in the record, the plaintiff was not entitled to recover, and that this cause should be reversed and judgment entered here in its behalf.

BRIEF OF ARGUMENT.

Having fully covered under the specifications of error practically all of the propositions of law involved, we deem it unnecessary to prolong this discussion further, except to present the authorities in support of the proposition that in order to entitle plaintiff to a recovery, the alleged violation of the Sixteen-Hour Law must be shown to have been the proximate cause of the death of her intestate.

As stated heretofore, the plaintiff does not allege that her intestate was overworked or fatigued, or that his actions at the time of the accident had any connection whatever with his working the five minutes which, it is claimed, elapsed after the expiration of the sixteen-hour period.

The Court of Appeals refused to discuss in its opinion the question of proximate cause (Rec., p. 44).

It is contended by plaintiff in error that there is no evidence in the record tending to show that deceased worked sixteen hours consecutively, or even twelve hours, consecutively; and it is likewise insisted that, even if he had worked from five to seven minutes over sixteen hours, there was no **causal connection** between the alleged act of negligence and his death. We, therefore, insist that the demurrer to the evidence should have been sustained by the court below.

"**PROXIMATE AND REMOTE CAUSE.** It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is, that in law the immediate and not the remote cause of any event is regarded; and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. In other words, the law always refers the injury to the proximate, not to the remote cause. The explanation of this maxim may be given thus: If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. * * * If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action. * * *

"When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequence resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to

have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause.

"If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. **But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote.**"

Cooley on Torts, pp. 68 to 71, inc.;

Broom's Legal Maxims, Sec. 215;

I White on Personal Injuries, Secs. 20 to 39, inc.;

Ray's Negligence of Imposed Duties (Personal), pp. 133-4;

III Elliott on Railroads (Orig. Ed.), Sec. 1310;

Beach on Contributory Negligence (2d Ed.), Sec. 31;

I Thompson's Commentaries on the Law of Negligence (2d Ed.), Sec. 45;

Webb's Pollock on Torts (Enlarged Am. Ed.), pp. 29 *et seq.;*

Shearman & Redfield on Negligence (5th Ed.), Secs. 25 and following;

Watson on Damages for Personal Injuries, Secs. 33-35;

Logan v. Railway Co., 139 Ky. 202, s. c. 129 S. W. 575-577;
L. & N. Ry. Co. v. Long's Admr., 117 S. W. 359, 361 (Ky.);
Georgetown Tel. Co. v. McCullough's Admr., 80 S. W. 782 (Ky.);
Setter's Admr. v. City of Maysville, 69 S. W. 1074 *et seq.* (Ky.);
Holman v. Ry. Co., 62 Mo. 564, *l. c.*;
Henry v. Ry. Co., 76 Mo. 288;
Sira v. Wabash Ry. Co., 115 Mo. 127;
Swearingen v. Ry. Co., 221 Mo. 644;
Atkinson v. Ry. Co., 90 Mo. App. 489;
Logan v. Ry. Co., 96 Mo. App. 461;
Fowlkes v. Ry. Co., 32 S. E. 464-5 (Va.);
Stone v. Ry. Co., 51 N. E. 1 *et seq.* (Mass.);
Searle v. Ry. Co., 65 Texas 274;
McClary v. Sioux City, Etc., Ry. Co., 3 Neb. 44;
Cuff v. Ry. Co., 35 N. J. L. 10;
Rockford v. Tripp, 83 Ill. 347;
Renner v. Canfield, 36 Minn. 90, s. c. 30 N. W. 435;
A. T. & S. F. Ry. Co. v. Calhoun, 213 U. S. 1 (Ok.);
Scheffer v. Ry. Co., 105 U. S. 249 (Va.);
M. & St. P. Ry. Co. v. Kellogg, 94 U. S. 469 (Ia.);
Minn. St. Ry. Co. v. Odegaard, 182 Fed. 56 *et seq.* (Minn.);
Mella v. N. S. S. Co., 162 Fed. 499 (N. Y.);
Teis v. Smuggler Mining Co., 158 Fed. 260 (Colo.);
Gwyn v. Ry. Co., 155 Fed. 88 (Tenn.);

U. S. F. & G. Co. v. Bank, 145 Fed. 273 (Ia.);
Jarnagin v. T. P. A., 133 Fed. 892 (Tenn.);
Lauterer v. Manhattan Ry. Co., 128 Fed. 540 (N. Y.);
Cole v. G. S. & L. Society, 124 Fed. 113 (Utah);
Cinn. N. O. & T. P. Ry. Co. v. Mealer, 50 Fed. 725 (Tenn.).

An unlimited number of authorities can be found in almost ever State of the Union discussing the question under consideration *pro* and *con*. We have simply undertaken to call attention to a number of leading cases wherein a thorough discussion of the entire subject will be found. We do not deem it necessary to quote fully from the above authorities, but will briefly call attention to the salient facts presented in each case, in order that this Court may determine what bearing, if any, said cases may have upon the matter to be considered here.

In

Broom's Legal Maxims, Sec. 215, p. 25,

Bacon's Maxim is reported, as follows:

> "It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of the acts by that, without looking to any further degree."

In

Ray's Negligence of Imposed Duties (Personal), 133-4,

it is said:

> "The proper inquiry is not whether the accident might have been avoided if the one charged with negligence had anticipated its occurrence, but, whether, taking the circumstances as they then existed, he was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor of any particular means which it may appear, after the accident, would have avoided it. The requirement is only to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident."

This is an exceedingly clear declaration of the law as applied to the facts of the present controversy.

In

III Elliott on Railroads, Sec. 1310 (Orig. Ed.),

it is said:

> "It is not sufficient to entitle an employe to recover damages for a personal injury to show a negligent breach of the employer's duty, for to entitle the employe to a recovery, it must be shown that the breach of duty was the proximate cause of the injury. * * * **The rule is illustrated by a case where a switchman was injured by stumbling over a piece of coke and falling in**

front of a train, and it was held that as the stumbling over the piece of coke was the proximate cause of the accident, evidence that the drawbars of the car which the switchman was running to couple were defective was immaterial."

In

Beach on Contributory Negligence, Sec. 31 (2d Ed.),

it is said:

"An act is the proximate cause of an event when in the natural order of things, and under the circumstances, **it would necessarily produce that event.** When it is the first and direct power producing the result, the *causa causans* of the Schoolmen."

He then quotes with approval Judge Cooley on Torts, page 69.

In

I Thompson's Commentaries on the Law of Negligence (2d Ed.), Sec. 45,

in discussing the question of proximate cause, it is said:

"This being one of the elements essential to a recovery, it follows that the **burden** of showing that the negligence, or other wrong, was the proximate cause of the injury, is upon the plaintiff. The plaintiff must not only prove negligence, but he must also prove that the negligence was the proximate cause of the injury. And he must show

this by sufficient evidence; mere surmise and conjecture that the negligence was the proximate cause of the injury are not sufficient."

In

I White's Personal Injuries on Railroads, Sec. 25,

it is said:

"When a new, independent cause, not under the control of the alleged wrongdoer, intervenes between the alleged wrongful act and the injury, if such intervening cause is not a consequence of the original wrongful act and could not have been foreseen by the exercise of ordinary care, and but for such intervening cause, the injury to the plaintiff would not have resulted, then the intervening cause will be taken to be the proximate cause of the injury and no recovery can be had from the party who is not responsible for such independent cause."

In

Logan v. Railway Company, 129 S. W. 575 (Ky.),

it appears that defendant (appellee) placed a car on the switch of a manufacturing company, the brakes of which were known to be bad by its employes, who chocked it on grade to prevent it from moving. Thereafter, employes of the manufacturing company, with knowledge that the brakes would not hold, attempted to let the car down for unloading by controlling it by

means of chocks; but the chocks failed to hold, and the car ran into other cars on the switch, knocking them against the plaintiff, who was engaged in picking up coal in the manufacturing company's employment. Judgment went for the defendant railway company in the court below, and plaintiff appealed.

Judge Settle, on page 577, in delivering the opinion of the Court, said, after citing with approval from **29 Cyc 492-3** and other authorities:

> "Tested by the principles stated, we do not think the facts of this case warrant a finding that appellant's injury was the natural, proximate consequence of appellee's failure to provide the car in question with reasonably safe brakes, or that it ought to have been foreseen by them in the light of attending circumstances."

The judgment of the Court was thereupon affirmed.

In

L. & N. Ry. Co. v. Long's Admr., 117 S. W. 359, et seq. (Ky.),

it appeared that Long was killed on January 11, 1906, about 1:15 a. m. At the time of his death, he was flagman and rear brakeman on one of appellant's freight trains, which was operated on its Kentucky Central Division. On the night of the accident, a northbound train composed of twenty-seven cars and manned by a crew of which Long was a member was side tracked at Cynthiana Station, in order to permit

a southbound freight to pass on the main track. When the northbound freight was side tracked, the conductor of the train and decedent started along for the purpose of ascertaining whether or not the train was in proper condition to continue its journey to Covington. To this end they began an examination of the hot boxes, broken brake rigging, defective couplings, etc. When the front trucks of the sixth car from the rear were reached, a hot box was discovered. The conductor put Long to work packing this hot box. Long had with him a lantern, a box of saturated waste and his packing iron. The hot box on which decedent was at work was situated on the left side of the train. The conductor left decedent engaged at this work, and walked towards the front of the train. Very soon the southbound freight train passed by them. The northbound train was started forward and proceeded for a distance of about two car lengths, when it was suddenly stopped by the application of the Sullivan valve. Shortly thereafter, the conductor returned to the point where decedent had been employed, and he found him almost at the same point where he was engaged in packing the hot box, lying under and near the front end of the third car. He was lying on his back with his head towards the engine. The Sullivan valve which had been pulled was located on the front end of the third car. Decedent's bucket and tools were near by, and the lantern (which had

been broken) was on his arm. There was further testimony to the effect that the rules provided, and as a matter of fact it was, decedent's duty to look after hot boxes or any defects there might be in the running gear, such as broken drawheads, arch bars, brake rigging or leaks in the air-hose connection, etc. It was shown that by rule 119, no train should leave a station without a signal from the conductor. The latter testified that he gave no signal to the engineer to leave. The head brakeman testified that he had no recollection of having given a signal to the engineer, but afterwards said he had not given any such signal. The engineer stated that the head brakeman gave him a signal to go forward. The theory of appellee was that Long was either beneath or between the cars when the train was started, and, if so, that the presumption was that he was engaged in inspecting or repairing the car, as the rules of the company required him to do, and that under these circumstances, the train was negligently started forward by the engineer.

On page 361, Judge Clay, speaking for this Court, said:

> "We may further concede that the engineer negligently started the train forward. Here, then, we have negligence proven, and injury resulting and death proven. This, however, is not sufficient. **In a long line of opinions, this Court has recognized the rule that it is necessary for the plaintiff to prove negligence naturally resulting**

in the injury. Unless the proof connects the proven injury as a rational and proximate cause of the proven negligence, there is nothing to submit to the jury. The absence of evidence upon any material point is as fatal to him who has the onus, as the absence of all evidence would be."

Then follows an array of authorities in support of the principles announced.

The rule laid down in the case above cited, when applied to the case at bar, clearly demonstrates that deceased lost his life not because of any alleged wrongful act of the defendant, but solely on account of his own voluntary act in deliberately climbing off of the engine and running between the rails—a known place of danger—while the locomotive was following him, and by stumbling or falling in front of the train, and that no fault of the defendant directly contributed to his injury.

In

Georgetown Tel. Co. v. McCullough's Admr., 80 S. W. 782 (Ky.),

the defendant telephone company rented two rooms in a building, one of which was used as an exchange and the other for storing materials. The owner of the building employed a carpenter to put up a partition next to the storeroom, in order to accomplish which, it was necessary to remove the materials stored therein, and, in doing so, the carpenter ordered his

assistant to remove a box of dynamite from the shelves. The assistant carried the box into the common hallway and placed it in a corner near the doorway of defendant's operating room, where, from some unknown cause, it was exploded, injuring plaintiff's decedent, who was at the time in defendant's operating room in the performance of her duties as one of defendant's operators.

It was held by Judge Barker, that the proximate cause of such injury was the negligence of the carpenter's assistant in placing the box where he did, and not the negligence of the company in storing the dynamite in its storeroom; and that a peremptory instruction should have been given in favor of the defendant.

In

Holman v. Railway Co., 62 Mo. 563-4, l. c.,

the plaintiff attempted to make out a case by showing that the bell was not rung nor the whistle sounded on defendant's train as the same approached a public crossing, and ran over his cow. The statute which required the bell on the locomotive to be rung or the whistle sounded provided a penalty for the neglect of such duty, and declared that the corporation should be liable for all damages which should be sustained by any person by reason of such neglect. Conceding that the servants of the defendant neglected to ring the bell or sound the whistle, the question presented

for the consideration of the Court was as to whether or not there was any evidence tending to show that the cow was killed by reason of such neglect.

On page 564, Judge Hough, speaking for the Court, said:

> "The foregoing extract clearly asserts, that there is no necessary connection between failure to ring the bell or sound the whistle, and the killing; that both may occur in point of time, and the latter not be the result of the former. How then must the connection be shown? By evidence, undoubtedly. Who must produce such evidence? The party who asserts that such connection exists. The damage must be shown to be the result of the negligence; that is, the negligence must first be shown, **and this fact must be supplemented by testimony tending to show that the negligence occasioned the damage.** * * * Upon the case made, it was the duty of the Court to declare as a matter of law that the plaintiff was not entitled to recover."

In

Henry v. Railway Company, 76 Mo. 288,

(which is one of the leading cases in Missouri on the question under consideration), the plaintiff shipped a carload of horses from Chillicothe to St. Louis over the defendant's railroad. He got on the caboose car of the freight train on which his stock was, at Brunswick, and reached Moberly in safety at 11 o'clock p. m. of the same day. When the train reached the round-

house west of the passenger depot at Moberly, the caboose was detached, and the train was run down into the lower end of the company's yards east of the passenger depot, where a train was to be made up to go on to St. Louis, having in it the car containing plaintiff's stock. When the caboose was detached, the brakeman said to plaintiff: "You get out and go down to the other caboose; this caboose goes no further." Plaintiff was also informed that this train would start from the lower or eastern end of the yard, in the course of an hour or two.

Thereupon, plaintiff and one Wagner, who was also going to St. Louis on the same train with plaintiff, got out and walked to the depot, and after remaining there about an hour, went eastward to the lower end of the yard to find their train. The night was quite dark; neither moon nor stars were shining, but it was light enough to enable plaintiff to distinguish his gray horses in the car, when close to them. When he found the train containing his stock, which appeared to be made up and ready to go, he and Wagner walked immediately back to the east or forward end of the caboose, which was at the rear or west end of the train, and got upon the platform of that car. Wagner tried the door of the caboose and failed to open it, and after remaining on the platform a few minutes, the plaintiff, becoming uneasy, tried the door, opened it, and walked in. The car was dimly lighted by a lantern,

and as plaintiff was about to seat himself, some person who was reclining on the opposite side of the caboose, asked him what he was doing in there. The plaintiff stated that the had stock upon the train. Whereupon, the other gruffly said: "Get out of here; the train is not ready."

Plaintiff thereupon went out upon the platform of the car where Wagner was, and the two remained there several minutes conversing and studying what to do. The yard contained five parallel tracks. The car on which they stood was on the center track, and there were two tracks on either side, with a space between about six feet wide. Plaintiff had never been in the yard before, but he knew it was a switch yard of defendant. Plaintiff left the platform, but wishing to remain near the caboose so he could conveniently jump on when they commenced pulling up the train, he walked south across the first track, which was unobstructed, and went to the second track, and stepped between the rails of the second track immediately behind the east end of a flat car, which was standing upon said track, intending to get upon the flat car and remain there until his train was ready to start. There were other cars west of the flat car, but none east. As plaintiff stepped upon the track, he put his hand upon the flat car, and finding that they had been hauling dirt upon it, concluded that he would not soil his clothes by getting upon it. He then turned around,

and was standing with his back toward the car. He was about to move away, when the flat car was struck by cars pushed against it from the west, and it ran over him crushing his leg. He heard no engine or train in motion to the rear of him, before he heard the noise made by the concussion of the cars when he was struck, and he saw no light in the direction from which they came, and no light in the yards except one to the east. He saw no yardman or brakeman in the yard. The foregoing are substantially all the facts which appeared for the consideration of the Court.

On pages 293-4, Judge Hough said:

> "When there is no conflict in the testimony, and all the causes contributing to produce an injury are known and unquestioned, whether a given act in the chain of causation is the remote or proximate cause of such injury, is a question of law for the Court. * * *
>
> "It is perhaps probable that if the plaintiff had not been ordered out of the caboose, he would not have been injured, but this hypothesis does not establish the legal relation of cause and effect between the expulsion and the injury. If the plaintiff had not left home he certainly would not have been injured as he was, but his leaving home could not, therefore, be declared to be the cause of his injury. As the plaintiff's injury was neither the ordinary, natural nor probable consequence of his expulsion from the caboose, such expulsion, however it might excite our indignation, in the absence of any regulation of the defendant to jus-

tify it, cannot be considered in this action, and the legal aspect of the case is precisely the same that it would have been if no such expulsion had taken place.''

The Court thereupon held that defendant's demurrer to the evidence should have been sustained.

We can conceive of no stronger case which directly applies to the facts under consideration here than the foregoing. It is very evident from the reasoning of Judge Hough that the alleged wrongful act of the defendant in permitting deceased to work beyond the sixteen-hour limit—if he did do so—had no causal connection with his unnecessary, voluntary act in walking before a moving train in close proximity thereto, and in falling down in front of the locomotive.

In

Sira v. Railway Company, 115 Mo. 127,

the plaintiff was a passenger upon defendant's train, and through oversight was carried by her station. She was seventeen years of age, and purchased a ticket for Mexico, Mo., intending to stop at Benton City. After the train had started, the conductor came through the car collecting tickets, and informed her that the train did not stop at Benton City, and that she would have to get off at Montgomery and wait there for another train. She objected, and insisted upon being let off at Benton City, but the conductor refused.

During the journey, a man named Dusenberry took a seat beside plaintiff and engaged in conversation with her. When the train was about to stop at Montgomery, the conductor told plaintiff that was the place for her to get off. Dusenberry offered to see her safely to a hotel, to which the conductor assented. Instead of taking her to a hotel, he took her to a saloon where he brutally abused her and ravished her.

Upon plaintiff's evidence, the Court directed a verdict for defendant, and judgment was entered accordingly. Plaintiff thereupon appealed. The Supreme Court, after reviewing the facts, held that the railway company, although it might be held liable for any damage necessarily sustained by plaintiff on being carried by the proper station, was not bound to anticipate that the intervening act of a third party would bring about the result which was accomplished in her case after she left the train in company with Dusenberry.

In

Swearingen v. Railway Co., 221 Mo. 644,

the petition charged that the defendant's tracks ran under a bridge or trestle of the Santa Fe tracks; that the iron posts of said bridge were so close to the Wabash tracks as to be dangerous to brakemen in the performance of their duties on Wabash trains; that deceased was a brakeman on a Wabash train, and was directed by the conductor to go down on the car to

examine and watch a hot box, and that, as he was obeying such direction, he was struck by the post and killed. The testimony showed that he was not so directed, but of his own motion, left the engine of the moving train to examine the hot box against the suggestion of the engineer that he let it alone, and that he was never again seen alive. No one saw him strike the post, or saw him on the car, or on any of the other nine cars which he had to cross in going from the engine to reach the car with the hot box. It was not shown that there was a ladder on the side of the car, plaintiff's witnesses saying that most of the cars did not have ladders on the side, but some of them might have had. He was found, with his skull broken, five or six feet from the track, near the bridge.

It was held by the Court that the evidence absolutely failed to support the allegations of negligence charged, and that the manner in which he came to his death was left purely to conjecture.

In

Logan v. Railway Company, 96 Mo. App. 461,

the railroad company set out a fire along the premises upon which the plaintiff was living. There was some standing hay upon the premises. The plaintiff, with the aid of another man, succeeded in saving some of the hay, but while doing so, he became surrounded by the flames, and in seeking to escape fell and was severely burned. The Court sustained a demurrer to

plaintiff's case as thus made, and directed a verdict for defendant from which the plaintiff appealed. There was no controversy about the facts.

On page 465, Judge Broaddus, speaking for the Kansas City Court of Appeals, said:

> "The rule of law in this State is, that unless the damages complained of were properly attributable to the wrongful act, there can be no recovery. In other words, the wrongful act must be the proximate cause of the injury, * * * Here the act of plaintiff in attempting to extinguish the fire appears to have been the cause of plaintiff's injury and not the wrongful act of defendant in suffering fire to escape from its engine in the first instance. In contemplation of law, the defendant would, as has been said, be liable to him for a reasonable compensation for his services in that respect, but it does not necessarily follow that it became surety for his personal safety. * * * In **Searle v. Ry., 65 Texas 274,** it was held: 'If one has violated a duty imposed upon him by the common law, he should be held to every person injured thereby, whose injury is the natural and probable consequence of his misconduct; and this liability extends to such injuries as might reasonably have been anticipated under ordinary circumstances, as the natural and probable results of the wrongful act'. But, **'if subsequently to the original wrongful or negligent act a new cause has intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote.'** "

In

Fowlkes v. Southern Railway Co., 32 S. E. 464 (Va.),

the plaintiff purchased a ticket on the statement of the ticket agent that the train which she was about to take made close connections at a certain point going to her place of destination. This statement was erroneous, and upon arriving at such connecting point, plaintiff found that she would be obliged to wait some time for the connecting train. She, thereupon, in the face of a storm and although she was in a delicate state of health, procured a buggy and drove over a rough road to her father's house.

Judge Keith, on pages 465 and 466, said in respect to the above facts:

> "The negligent act proved in this case was committed **at the time the ticket was purchased,** and it seems to us manifest that a most prudent and experienced man, acquainted with all the circumstances which existed at that moment, could never have foreseen or anticipated the consequences which intervened. It might reasonably have been anticipated that a failure to make the connection at Moseley Junction would involve delay and inconvenience, but not that the plaintiff would procure a buggy, and in the face of a storm, in her delicate condition, drive over a rough road to her father's house, and that a miscarriage would be the result.
>
> It was the province of the Court to say what

evidence should go before the jury, and its action in that respect is, of course, the subject of review; but it is a question exclusively for the Court, and upon it devolved the duty of determining, in the first instance, **whether the facts offered in evidence tended to prove an injury to the plaintiff too remote from the defendant's act of negligence to constitute an element in the plaintiff's recovery.**"

It was thereupon held that the court below properly excluded the above testimony.

In

Stone v. Boston, Etc., Ry. Co., 51 N. E. 1 et seq. (Mass.),

it seemed that defendant's railway depot, freight house, and a platform used mostly for storing oil were situated across the street from plaintiff's buildings. The platform had become thoroughly saturated with oil leaking from the barrels. A teamster, not connected with the defendant, brought goods to be shipped by it, and in lighting his pipe, threw a match on the ground underneath the platform, which immediately caught fire, and with it the oil standing on the platform, destroying plaintiff's buildings as well as those of the defendant. **All of the oil had been on the platform for a longer time than forty-eight hours which was prohibited by law.** Plaintiff's buildings would probably not have been burned if there had been no oil on the platform.

It was held by Allen, Judge, speaking for the Court, that the fire resulting from leaving the oil on the platform could not have been anticipated by the defendant, and that as its acts could not have been the proximate cause of the fire, the plaintiff could not recover. It was further held that in a case of this character, where defendant's act was the remote and not the proximate cause of plaintiff's injury, the plaintiff was not entitled to recover. A vast array of authorities are cited in the opinion in this case, and we think the principles announced therein are directly conclusive against a right of recovery in this action.

In

McClary v. Sioux City, Etc., Ry. Co., 3 Nebr. 44,

it appeared that a train was forty-five minutes late when it arrived at a certain point, and that as it neared said point, a gust of wind threw it from the track, and injured the plaintiff. It was held that, although the train would have escaped the gust of wind if it had been on time yet the accident was neither the natural nor probable consequence of the delay; that such accident was due to an independent force, and that the road was not liable to the plaintiff.

This case, like many of the others, is directly applicable to the facts in controversy in the case at bar.

Here there is no charge in the petition that the deceased was injured or killed by reason of being overworked nor was there any testimony adduced at the trial which tended to show that his falling in front of the moving locomotive was occasioned in any respect by his being overworked from five to seven minutes. There is no more ground for holding that deceased's independent action in deliberately going into a known place of danger in front of a moving train, which ran over and killed him, was occasioned by his being overworked from five to seven minutes—if this be true—than that the negligence of the railway company in the Nebraska case just cited in failing to start forty-five minutes sooner was the proximate cause of the passenger's injury.

In

Rockford v. Tripp, 83 Ill. 347,

a horse was hitched to a defective post. The horse became frightened by the running away of another horse, broke the post, and ran over a person in the street. It was held that the injured person could not maintain an action based upon the defective post as the cause of his injury.

As this action is attempted to be brought and maintained under a Federal statute, we desire to call especial attention to the following decisions of the United States Supreme Court and those of the different Dis-

trict and Circuit Courts in respect to the question of proximate cause.

In

Atchison, Etc., Railway Co. v. Calhoun, 213 U. S. 4, et seq.,

the facts were as follows: Mrs. Calhoun and her son, the plaintiff, a boy a little less than three years of age, were passengers upon a southbound train of the defendant railroad. Their destination was Edmond, in the Territory of Oklahoma. The train, somewhat late, arrived at Edmond about 11:30 o'clock in the evening. Mrs. Calhoun had never traveled over the route before, the station was not called out by any of the trainmen, nor was she told by any of them that it was Edmond. In answer to a question she was informed by other passengers that the train had arrived at Edmond, and she hastened to alight, leading the boy with her. When she reached the platform of the car the train had started up again, after, as the jury found, a stop of one minute, and she handed the boy to Mr. Robertson, another passenger on the train, who had left it momentarily, intending to return and resume his journey. Mr. Robertson was then standing upon the station platform. He took the child, handed it to his son, whom he had met at the station, returned to the steps of the car, and told Mrs. Calhoun not to jump off, as the car was running too rapidly. The station platform was dimly lighted, and no employe

of the defendant rendered Mrs. Calhoun or her boy any assistance in leaving the train, nor gave them any warning.

The plaintiff was landed without injury on the station platform and put in the charge of Mr. Robertson's son by his father who said: "Keep the child and the train will stop and let the lady off." Just then a young man or boy by the name of Carl Jones, supposed by Mr. Robertson's son to be a railroad official, though he was not, took up the child in his arms, ran along by the car, which was moving all the time with increasing rapidity, and attempted, without success, to return the child to its mother, who was standing on the platform of the car. Jones ran 75 to 100 feet to the end of the wooden station platform and then stumbled over a baggage truck which had been left at the very end of the platform, and partly on it, within a few feet of the rails. When Jones stumbled he lost his hold of the child, who fell under the car and was injured. The train consisted of the engine, followed by a mail car, baggage car, express car, smoking car, day coach, in which the plaintiff had been traveling, chair car, and a sleeper, in the order named. The baggage car, therefore, was some distance ahead of any passenger car, and the truck was used at the baggage car and left at or near the point where it had been used. Mrs. Calhoun started to leave the car at its south end, nearest the baggage car,

and there was, therefore, between that point and the north end of the baggage car the length of the express and smoking cars. Jones was not called as a witness by either party. None of the trainmen knew that Jones was attempting to put the plaintiff back on the train until after the injury.

On page 7, Mr. Justice Moody, in behalf of the Supreme Court, said:

> "In this case undoubtedly the plaintiff's injury was traceable to the original negligence, in the sense that it would not have occurred if the plaintiff had not been separated from his mother. Nevertheless, that negligence may not be the cause of the injury, in the meaning which the law attributes to the word 'cause' when used in this connection. The law, in its practical administration, in cases of this kind regards only proximate or immediate and not remote causes, and in ascertaining which is proximate and which remote refuses to indulge in metaphysical niceties. Where in the sequence of events between the original default and the final mischief an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause."

On page 9, the same learned Judge continued:

> "Was the company guilty of negligence in leaving the truck in a dangerous position and not

having the depot platform properly lighted, and did that condition directly and proximately cause the injury?"

On page 10 Mr. Justice Moody concluded the opinion as follows:

"The train was at rest, so that no part of it from which passengers might be expected to get off or on was near the truck. It was, of course, dark at the point where the truck was, but no one could foresee that passengers intending to leave or enter the train would be at that point. No amount of human foresight which could reasonably be exacted as a duty could anticipate that a passenger, after the train had started, would run a distance of from 75 to 100 feet with the purpose of boarding a train moving with increasing rapidity, much less that a person would take a helpless infant and while thus running attempt to place it on a train. We are of the opinion that the railroad was not bound to foresee and guard against such extraordinary conduct, and that its failure to do so was not negligence. For these reasons the judgment must be reversed."

In

Scheffer v. Railway Co., 105 U. S. 249 (Va.),

it appears from the record that Charles Scheffer was a passenger on defendant's road, and received injuries which, it was claimed in the petition, resulted in his death. The defendant successfully demurred to the petition. On page 520, Mr. Justice Miller said:

"The declaration, after alleging the carelessness of the officers of the company, by which a collision occurred between the train on which Scheffer was and another train, on the seventh day of December, 1874, proceeds as follows:

" 'Whereby said sleeping car was rent, broken, torn and shattered, and by means whereof the said Charles Scheffer was cut, bruised, maimed and disfigured, wounded, lamed and injured about his head, face, neck, back and spine, and by reason whereof the said Charles Scheffer became and was sick, sore, lame and disordered in mind and body, and in his brain and spine, and by means whereof phantasms, illusions and forebodings of unendurable evils to come upon him, the said Charles Scheffer, were produced and caused upon the brain and mind of him, the said Charles Scheffer, which disease, so produced as aforesaid, baffled all medical skill and continued constantly to disturb, harass, annoy and prostrate the nervous system of him, the said Charles Scheffer, to-wit, from the seventh day of December, A. D. 1874, to the eighth day of August, 1875, when said phantasms, illusions, and forebodings, produced as aforesaid, overcame and prostrated all his reasoning powers and induced him, the said Charles Scheffer, to take his life in an effort to avoid said phantasms, illusions and forebodings, which he then and there did, whereby and by means of the careless, unskillful and negligent acts of the said defendant aforesaid, the said Charles Scheffer, to-wit, on the eighth day of August, 1875, lost his life and died, leaving him surviving a wife and children.'

"The Circuit Court sustained the demurrer on the ground that the death of Scheffer was not due to the negligence of the company in the judicial sense which made it liable under the statute. That the relation of such negligence was too remote as a cause of the death to justify recovery, the proximate cause being the suicide of the decedent—his death by his own immediate act.

"In this opinion we concur."

After reviewing two leading cases upon the subject of proximate cause, Mr. Justice Miller concluded the opinion, on page 252, as follows:

"Bringing the case before us to the test of these principles, it presents no difficulty. The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rule in both these cases a new cause, and a sufficient cause of death.

"The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that 'great first cause least understood', in which the train of all causation ends.

"The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have

been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train.

"His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him and his death."

In

Mella v. Northern S. S. Co., 162 Fed. Rep. 499 (N. Y.),

the deceased sustained a dislocated shoulder by a fall on defendant's steamship, due to the defendant's alleged negligence, after which he went to a hospital where he was given chloroform prior to the reduction of the dislocation. During this operation, intestate died from paralysis of the heart, solely due to the chloroform, the injury not being such of itself, independent of the chloroform, as to have caused death. It was held that the unnecessary giving of the chloroform, for which defendant was not responsible, and not the injury, was the proximate cause of intestate's death, and that no right of action existed. After a very exhaustive review of the authorities, Judge Ray, on page 519, used this language:

"In short, I am of the opinion that when one person is injured by the negligence of another, and such injury is in no event fatal, the negligent

party cannot be held liable for the consequences of the unnecessary and dangerous acts of the surgeon employed by the injured party, even when done in the course of or in connection with necessary surgical operations."

Applying the above principle of law to the case at bar, it may be said that, even if deceased had been required to work more than sixteen hours consecutively—which is not shown to be true by the record—his own independent, intervening act in falling down in front of the moving locomotive was entirely unrelated to the alleged negligence of the defendant.

In

Teis v. Smuggler Mining Co., 158 Fed. Rep. 260 (Colo.),

plaintiff was employed in defendant's mine, was overcome by gas, and was afterward found, lying on the ground unconscious, by a searching party. He was taken to the surface by such party, on the elevator cage, which was five and one-half feet square, two sides being enclosed and two open. By reason of the projection of one of his feet beyond an open side of the cage, it was caught by the timbers of the shaft and his leg broken.

Judge John F. Philips, in a very exhaustive and able review of the law upon the subject of proximate cause, held that the negligence of the defendant in permitting a dangerous quantity of gas in the mine, if

conceded, while a remote, was not the proximate cause of the injury to plaintiff's leg, and that the negligence of those who placed plaintiff in the cage was the primary cause of such injury. Judge Philips likewise held that plaintiff was not entitled to recover, under the rule that one committing an act of negligence is responsible only for such consequences as would naturally have been foreseen. On page 269, the learned Judge, in discussing the case, said:

> "When the plaintiff was carried to the surface of the mine, and the doctor had placed him on a table for examination, had some third party carelessly struck a leg of the table and overturned it, whereby the plaintiff's leg would have been broken, could it be said that that was the natural or probable result of the presence of gas in the mine, which the defendant should be held to have anticipated? The breaking of the plaintiff's leg was such an abnormal, extraordinary incident, through the carelessness of the men who carried him up the elevator, as to exclude it from the range of reasonable probability as the result of the gas in the mine. It was a result that might not have happened in a thousand repetitions of carrying him up the elevator. As well say, if his rescuers had abstracted his pocketbook or his watch, while he was comparatively unconscious and helpless, the defendant company should be held liable because he was rendered helpless by the gas, and that that was the first and continuing unbroken cause."

In

Gwyn v. Railway Company, 155 Fed. Rep. 88 (Tenn.),

plaintiff's intestate was riding on defendant's road on a through ticket, which entitled him to transportation to a junction with the next connecting road. The train on which he took passage did not stop at the junction, but stopped at a station four miles north, to which the train of the connecting road also ran over defendant's track to make connection with it. Deceased was advised of such fact, and told to get off at such station, which he did, but, for some unexplained reason, got back on the same train and started southward. He was soon discovered by the conductor, who put him off a half mile south of the station and told him that if he would hasten back he could still catch his connecting train, which would soon follow. The place at which he was put off was between two tunnels, and he walked back through the north one. While talking with a man whom he met, his train left the station, which was in sight and only a short distance away. He then turned southward again, walking through the first tunnel and entered the second, which was sixteen hundred feet long, curving, very dark and narrow. While in such tunnel he was struck by a train and so injured that he soon died. There was no material evidence to show how he came to be struck.

It was held that, conceding deceased was put off at a dangerous place between two tunnels, he had passed such danger and reached a place of safety, and that the proximate cause of his death was, not such negligence of the conductor, but his own voluntary act in turning back, for which defendant could not be considered liable. Judge Lurton, in holding that no right of action existed, said:

> "A wrongdoer is responsible for the results which should be anticipated as the natural consequences of the wrong, but not for those which ensue from some line of conduct by the injured person or unforeseen consequence which might not be reasonably anticipated. The relation of defendant's original negligence to the collision which occurred in tunnel number 26 was too remote to be regarded as the proximate cause of his death."

Then follows a long line of leading authorities sustaining the same principle announced by Judge Lurton.

The theory of law announced in the case just cited, when applied to the one at bar, leaves no room for controversy. If the defendant railway company permitted or required deceased to work five to seven minutes over the sixteen consecutive hours contemplated by the Federal Act, then it might be held to assume responsibility for all acts which necessarily followed the

violation of such duty, and might also be held responsible for those things which a reasonably prudent man would be required to know would naturally follow in the wake of such violation. But, under the above authorities, and particularly the one last cited, the defendant, in the absence of any evidence tending to show that the deceased was wearied or exhausted, was not bound to anticipate that he would voluntarily assume a place of danger between the tracks and fall down in front of a moving train, losing his life thereby.

In

Cole v. G. S. & L. Society, 124 Fed. Rep. 113 (Utah),

the plaintiff entered and passed along a hall in the building of the defendant, to take the elevator, the well or shaft of which opened into the hall. A boy, who was a stranger to her and to the defendant, hurried past her in the hall, pushed the sliding door of the well of the elevator, which was open from one to ten inches, back as far as it would go, and stepped back. The plaintiff supposed this boy was the operator of the elevator and stepped in. The elevator was at an upper floor, in charge of its regular operator, and plaintiff fell to the bottom of the well and was injured. The hall was so dark that it was difficult, but not impossible, to see the elevator when it was at the lower floor, and when it was not there, nothing but darkness was visible in the well. The strange boy had been seen

by witnesses riding and visiting on the elevator a dozen times and endeavoring to operate it once. The door of the shaft or well could be opened from the outside, when it was latched, by lifting and sliding it. It would bound open from one to ten inches when the operator jammed it, and it was often left open to that extent.

It was held that the negligent acts and omissions of the defendant were not, and those of the strange boy were, the proximate cause of the injury; that the latter constituted an independent, intervening cause which interrupted the natural sequence of events between the negligence of the defendant and the injury of plaintiff, insulated the defendant's negligence from the plaintiff's hurt, broke the causal connection between them, and produced her injury.

Judge Sanborn, on page 115, in disposing of the case, said:

> "An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it, had not the interposi-

tion of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate cause of the injury. A natural consequence of an act is the consequence which ordinarily follows it—the result which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it. Chicago, St. P., M. & O. Ry. Co. v. Elliott, 55 Fed. 949, 952, 5 C. C. A. 347, 350, 20 L. R. A. 582; Railway Co. v. Kellogg, 94 U. S. 469, 475, 24 L. Ed. 256; Hoag v. Railroad Co., 85 Pa. 293, 298, 299, 27 Am. Rep. 653.

"Let us try the issue in hand by these familiar rules. **It goes without saying that the injury of the plaintiff was the natural and probable consequence of the act of the trespasser who preceded the plaintiff to the elevator, opened the door of the well, and stepped back, thus inviting her to pass into the shaft.** No one can contemplate this act for a moment without a clear conviction that the fall and the injury were its natural and probable result. This act was, therefore, a proximate cause of the injury—an act of negligence which formed the basis for an action for damages against the strange boy who committed it. It was not only the nearest cause of the disaster in point of time, but it was the moving and efficient cause—the cause without which, so far as finite vision can see, the accident would never have occurred."

On page 116, he further said:

"A negligent act from which an injury could not have been foreseen or reasonably anticipated is too remote in the line of causation to sustain an action for an injury in every case, and the concurring negligence of another cannot make it less remote, nor charge him who committed it with responsibility for it to which he would not have been liable to answer in the absence of the negligence of the third party."

On page 117, he further said:

"In other words, the concurring negligence of another cannot transform an act of negligence which is so remote a cause of an injury that it is not actionable into a cause so proximate that an action can be maintained upon it. It cannot create a liability against one who does not legally cause it, or make an injury the natural and probable result of a prior act of negligence which was not, or would not have been, such a result in its absence. No act contributes to an injury, in the legal acceptation of that term, unless it is a proximate cause of that injury—unless that injury could and ought to have been foreseen or reasonably anticipated as its probable consequence. * * * The burden of proof was upon the plaintiff to establish a state of facts which would naturally lead to the conclusion that her entrance and fall in the well were the natural and probable consequences of these acts of negligence committed by the defendant. If she failed to successfully bear this burden, she was entitled to no damages from the Savings and Loan Society."

On page 120, he further said:

> "Try this case by any of these tests, and the result is the same. The independent voluntary act of the strange boy, who opened the door of the elevator and invited the plaintiff to enter the well, was incapable of anticipation. No one could have foreseen it as the probable consequence of the acts or omissions of the defendant. It broke the chain of causation between the prior negligence of the defendant and the injury of the plaintiff, insulated the defendant's acts and omissions from the plaintiff's hurt, and imposed upon the boy who willed and committed the act which produced the injury the sole liability for the damages which resulted from it. The acts and omissions of the defendant were too remote to legally contribute to the injury or to impose liability for it. They were not a proximate cause of the accident, and the mischievous and wrongful act of the strange boy was the sole moving efficient proximate cause that produced it."

On pages 121 and 122 Judge Sanborn concluded the opinion as follows:

> "There is, however, always a preliminary question for the Judge at the close of the evidence before a case can be submitted to the jury, and that question is not whether or not there is any evidence, but whether or not there is any substantial evidence upon which a jury can properly render a verdict in favor of the party who produced it. (Then follows an array of authorities.)

"The burden of proof is upon the plaintiff in an action for personal injury to establish the fact that the acts of negligence of which he complains were the proximate cause of the injury suffered, and if at the close of the testimony in a trial for personal injury there is no substantial evidence upon which a jury can properly find that the negligence charged was the proximate cause of the hurt sustained, it is the duty of the Court, as it is in a like condition of the evidence in the trial of every other issue of fact, to instruct the jury to return a verdict for the defendant."

The learned Judge then cites a large number of cases sustaining the conclusions thus reached.

We know of no abler Judge on the bench in this country than the author of the above opinion. He has reviewed and carefully considered all of the leading cases upon the subject of proximate cause, and we believe that the rules of law announced by him in the case just cited are directly applicable to and conclusive of the present controversy. As heretofore indicated, the action in the case at bar is based upon the Federal statute, and the rulings of the Federal courts in respect to the question under consideration ought to govern in the determination of this case.

We therefore insist, in concluding this branch of the case, that the plaintiff signally failed to make out a case, and that by reason thereof appellant's peremptory instruction should have been given at the

close of the evidence. As, in our opinion, no right of recovery can be sustained, we respectfully ask that this Court reverse the cause and enter judgment here for plaintiff in error.

CONCLUSION.

In presenting this case, we have doubtless gone more into details than was necessary; yet we feel that the principles involved are of vital interest, not only to the plaintiff in error, but to all other railway companies. Hence we have endeavored to cover fully every feature of the case disclosed by the record.

We believe that a fair and impartial consideration of the cause will lead the Court to the conclusion that the plaintiff's case is without merit, and that no actionable negligence has been shown by the record against the defendant which could be regarded as a proximate cause of the death of plaintiff's intestate.

It is perfectly manifest that numerous errors exist in the record, and that the case was tried practically upon the theory that the plaintiff in error was an insurer of the safety of the deceased under the Sixteen-Hour Law, and that the plaintiff was entitled to recover, as stated by the Court of Appeals, if the deceased worked even five minutes over the time prescribed by the statute, although there was no causal connection between the alleged violation of said statute and the death of plaintiff's intestate.

We, therefore, respectfully pray that the judgment of affirmance entered by the Kentucky Court of Appeals be reversed, and that judgment be entered here in behalf of plaintiff in error.

Respectfully submitted,

M. L. CLARDY,

E. T. BULLOCK and

R. T. RAILEY,

Attorneys for Plaintiff in Error.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* McWHIRTER.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 541. Argued December 4, 1912.—Decided June 10, 1913.

Where the case was decided on the Federal question, the fact that it might have been decided from a non-Federal point of view does not afford a basis for holding that it was decided on the latter ground and that this court has no jurisdiction under § 709, Rev. Stat.

While the power of this court to review the judgment of a state court is controlled by § 709, Rev. Stat., § 237, Judicial Code, yet where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal statute, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law.

It was not the intent of Congress in enacting the Hours of Service Act of 1907 to subject carriers to the extreme liability of insurers of the safety of their employés by rendering them liable for all accidents occurring during the period of over-time whether attributable to the fact of working over-time or not.

In order to render the carrier liable under the Hours of Service Act there must be proof tending to show connection between permitting the over-time work and the happening of the accident.

In this case the evidence does not reasonably tend to connect the working over-time with the accident which occurred about seven minutes after the expiration of the permitted period.

145 Kentucky, 427, reversed.

THE facts, which involve the construction of the Hours of Service Act of 1907, and the liability of a railroad company thereunder, are stated in the opinion.

Mr. R. P. Railey, with whom *Mr. M. L. Clardy* and *Mr. E. T. Bullock* were on the brief, for plaintiff in error.

Mr. William V. Eaton, with whom *Mr. Aubrey Everett Boyd* was on the brief, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The record in this case is confusedly arranged, and numerous matters are pressed in argument which we deem to be irrelevant. Not following the various steps by which the petition as originally filed and the answer were both frequently amended, the case as finally put at issue was as follows: The defendant in error as administratrix of the estate of her husband Etwal McWhirter, sued the plaintiff in error, for the benefit of herself and her four infant children, to recover damages alleged to have been suffered by the death of McWhirter. It was alleged that the deceased was employed as a flagman by the defendant company and that he was doing that work on an interstate commerce freight train when he was run over and killed by the train on which he was serving. The death was alleged in general terms to have resulted from the wrongful and negligent acts of the conductor and engineer in charge of the train and by the negligent and wrongful acts of the train dispatcher and higher officers of the defendant company. It was moreover alleged that the deceased "had been permitted and required by the officers and agents of the defendant to be and remain on duty for a longer period than sixteen consecutive hours, next before the aforesaid accident, and in violation of Chapter 2939, section 2, 34 Stat., 1415, of the acts of Congress of the United States relating to interstate commerce, and being a part of an act entitled 'An Act to Promote The Safety Of Employés And Travelers Upon Railroads By Limiting The Hours Of Service Of Employés Thereon,' which became a law on the 4th day of March, 1907, and also an act entitled 'An Act Relating To The Liability Of Com-

mon Carriers By Railroad To Their Employés In Certain Cases,' which became a law on the 22nd day of April, 1908 (35 Stat. 65, c. 149); and that the aforesaid negligent and wrongful acts of the officers and agents of the said defendant, and the said violation of the laws of the United States relating to interstate commerce were the proximate and sole causes of the death of her said husband, and she relies on the laws of the United States made and provided in such cases."

The answer of the defendant company denied the charges of negligence of its officers and other employés, admitted the death of McWhirter at a date and hour which was specified while employed as alleged in the petition, and stated facts which it was charged established that the death was an unavoidable accident for which the company was not responsible. It, besides, averred there was no right to recover because of an alleged written contract of assumption of risk entered into by the deceased and the company at the time he entered its service several years before the happening of the accident.

The case was tried to a jury. During the course of the trial both sides made various objections to evidence and exceptions were taken to testimony offered. All the evidence upon which the case was tried is in the record. Leaving aside trivial matters having no tendency to affect the result, the entire case, as to negligence, was this: The defendant operates a line of railroad through the States of Missouri and Illinois, and Illmo is a station on the main line in Missouri, and Bush a station on a branch line in Illinois, the branch diverging from the main line at a station in Illinois called Gorham. On the afternoon of February 22, 1910, at 3:30, a train of empty coal or freight cars was started from Illmo, destined for Bush for the purpose of being loaded with coal and returning. The train reached Bush about 11:30 that night. It there either loaded some of the empties with coal or exchanged some

for loaded cars. Exactly how long a time the operations at Bush consumed is not precisely fixed, one witness saying an hour, and another an hour and a half, and the same divergence exists as to the hour of departure on the return journey, one witness saying 12:30 and the other one o'clock. Gorham, where the branch line connects with the main line is about twenty miles from Bush. When the train reached that point on the return trip is not shown. Certain it is, however, that judging by the average speed of the train somewhere about 6:15 the train passed a station called Howardtown, where there was a siding, and found itself at either 7:35 or 7:37 drawing into a station called Wolf Lake which is fifteen miles from Gorham and thirty-five miles from Bush. The proof as to what then took place is contained in the testimony of three witnesses. Guess, the engineer of the train, Roberson the telegraph operator who was stationed at Wolf Lake, and Loper the conductor of the train.

Omitting as a general rule questions and answers except where it may be thought important to reproduce them, we state in narrative form the entire testimony of the first two of these witnesses and make such reference to the third (Loper) as has any bearing upon the happening of the accident.

The engineer testified, as a witness for the plaintiff, as follows:

"I have been employed as an engineer three years by the St. Louis, Iron Mountain and Southern Railway Company, for a longer period than that was a fireman. At Illmo, Missouri, I was called out on the afternoon of February 22, 1910, at 3:30 o'clock as near as I can remember. The crew of the train was as follows: Loper, conductor, flagman Mansker, brakeman McWhirter and fireman Edmiston. The train was going to Bush in Illinois. Bush is on a branch line which runs from Gorham to Bush. I do not recollect what hour we arrived at

Gorham, but we changed from the main to the branch line. The train going up to Bush consisted of nine empties, a freight train. We stayed about an hour at Bush. We set out the train of empties, and turned the engine. It took about an hour to make the transfer at Bush. We came back to Gorham, going south towards Illmo. McWhirter was killed, returning, at Wolf Lake, on the morning of February 23, at 7:35 as near as I can remember. It was in that neighborhood. He was killed performing his duty, going out to set a switch.

Question. Just detail the manner as it occurred, as you know it?

Answer. As I came into Wolf Lake, when I whistled for town, brakeman McWhirter asked me if I were going to head in at Wolf Lake. I told him yes, that we had to get in on account of the sixteen-hour law. He got up, went out at the front window on the left side of the engine along the footboard, and the next thing I seen was the operator at Wolf Lake very much excited in giving a stop signal. I stepped off of engine, asked him what was the matter. He said, 'My goodness you have run over the brakeman.' I went looking for him, found him under the left tank wheel, cut in two.

Q. Did you know this brakeman was in front of the engine?

A. No, sir.

Q. Did you see him go out of the cab window?

A. I seen him go out of the cab window. That is all.

Q. What did you suppose he went out of the cab window for?

A. He is supposed to get out there to open the switch. I supposed that is what he went out there for.

Q. Was it his duty to throw the switch in front of the window or not?

A. No, sir, it wasn't his place to throw it in front of the window. He wasn't supposed to go out on that pilot.

Q. What I mean is was the switch that the brakeman was required to throw in front of the engine or behind of the engine?

A. It was in front of the engine. I have no record that would show the minute that the train arrived at Wolf Lake on the morning of the 23d. I testified before the Coroner's jury. As near as I can remember I stated at the Coroner's inquest that the train arrived at Wolf Lake at 7:35. That would make five minutes over the sixteen-hour law.

Q. You stated before the Coroner's inquest 'at 7:30 the sixteen-hour law was up. We were seven minutes over time.' Was that correct?

A. I suppose so. As near as I can remember it was five minutes. It was 7:35. If I said 7:37 that was correct. Then I knew it. It has been over a year ago now. Neither cylinder of my engine was bad, more than ordinarily. It wouldn't make any difference in this case. Neither was leaking steam. I was not working steam when he was killed. The engine was drifting. Understand, shut off, there would be no leak there. Neither cylinder had been leaking steam that morning. There had not been anything the matter with the engine on this return trip. Nothing at all.

Q. Who saw this man run over?

A. Mr. Roberson was the only man I can say. Mr. Fred Roberson. He was standing on the platform. The train was going out to Wolf Lake. Destination was Illmo.

The crew of my train did not go any further than Wolf Lake. There was another crew that came to relieve us there."

On cross-examination the witness testified:

"McWhirter knew of our purpose to head in at Wolf Lake, for I told him that we were going to head in on account of the sixteen-hour law. Wolf Lake was the first

switch or place which we could enter at the expiration of the sixteen-hour law. It was McWhirter's duty as brakeman to throw the switch.

Q. When was the first time that you knew of the unfortunate accident?

A. When Mr. Roberson told me what had happened.

Q. Whom do you mean by Mr. Roberson, who was he?

A. The telegraph operator at Wolf Lake."

On re-direct examination the witness said:

"It is about in the neighborhood of fifteen miles from Wolf Lake to Gorham, and about six miles from Wolf Lake to Howardtown. There is a switch at Howardtown. There was no defect in the pilot step and I know nothing about how this accident happened except from the fact that the telegraph operator told me that something was wrong."

F. A. Roberson, a witness for the plaintiff, testified as follows:

"I am employed as a telegraph operator by the St. Louis, Iron Mountain & Southern Railway Company, and have been so employed since July, 1904. I was stationed, as operator, at Wolf Lake on February 22, 1910. I was at the station on the morning of the 23rd of February when extra train No. 503 came into Wolf Lake from the north. I saw the train when it pulled in. It was about 7:37 as well as I recollect by the time it got to the depot.

Q. Just tell what you know about the accident that happened at Wolf Lake on that morning?

A. As I was sweeping out the office, I heard an engine coming. I looked out of the window and saw it was an extra south—saw it was a train coming south—didn't know it was an extra. I seen they were stopping and I wondered what they were stopping for and went ahead sweeping. When they came in close to the office I went out and was standing on the platform. I saw a man leave the cab window and come down the left running board

and came down to the pilot, and as it was nearing the switch he left the pilot and struck the ground running and the next I saw he fell face downward between the rails. I next saw him on his hands and knees. After that I turned my eyes to the engineer and did not see him any more, giving the engineer a stop signal. When he came to a stop I told the engineer something, but I do not remember what I told him, but that was the last I saw of the brakeman until he was taken from under the tender of the engine.

He was dead when he was taken out from under the engine. The weather was pretty cold—weather chilly, cold. As near as I can remember, the ground was frozen. I do not remember that there was any ice and sleet on the ground.

Q. Do you know how this man came to fall?

A. I do not.

There were cinders between the rails where he was, ashes between the rails, a little higher than the other ground about the place he was killed. I believe they were frozen. I do not recollect whether it had been raining on the night of the 22nd—not that I remember of it raining. I do not think any one else saw McWhirter at the time he was killed—not at the office. At that time there was no one else around there except the train crew on this freight train.

The remainder of the testimony of the witness is as follows:

"Q. When you saw McWhirter's perilous condition you say you turned your head. Why did you do that?

A. I don't remember saying I turned my head. I turned my eyes from the brakeman to the engineer.

Q. Did you know that he was in a condition to be hurt?

A. I didn't positively know so, but I thought he was in a dangerous condition down there.

Q. How far did the train run before the engineer stopped it after you notified him of this trouble?

A. I suppose about the length of an engine. Maybe not quite so far, maybe a little further. I don't remember.

Q. Do I understand you to say that Mr. McWhirter left the engine, passed down over the pilot and was out on the ground when you saw him?

A. He was on the ground when I saw him.

Q. How far was he from in front of that engine when he fell?

A. That is pretty hard for me to judge because he was in line of the engine and myself.

Q. How far was it from where he fell to the switch which he was called on to turn?

A. Perhaps three or four car lengths, maybe not so far.

Q. How far is a car length—how many feet?

A. That is pretty hard for me to say.

Q. How long is a car?

A. Well, they ordinary run thirty-six feet, some of them thirty, some of them forty.

Q. Now, when you saw him fall how far was he from this switch?

A. About three car lengths. About three car lengths."

Redirect examination by Mr. E. Boyd, counsel for plaintiff:

"Q. You say that at the time McWhirter fell he was in line with you and the engine. Explain what you mean by that?

A. In direct with me—between where I stood and where he got off putting me in direct line with him and where he got off. I can't tell whether he was ten, twenty or how far he was from the engine.

Q. You mean, if I understand you, that the train was coming towards you and he stepped off between you and the engine, is that correct?

A. That is correct.

Q. Do you know whether or not the cylinder heads of this engine were leaking?

A. I couldn't say whether it was the cylinder heads or not. I recollect there was some steam or other from the engine.

Q. Steam was escaping?

A. Steam was escaping from the engine, as well as I recollect."

Cross-examination by Judge E. T. Bullock, counsel for defendant:

"Q. Do you know what caused that?

A. I do not."

As to the testimony of conductor Loper, it suffices to say that he swore he was in the caboose and saw nothing of the accident, although he knew it occurred as the train was entering the station at Wolf Lake at 7:37 in the morning. When examined as a witness for the plaintiff he testified on cross-examination that at the time of the accident the train could not have been going more than two miles an hour because they stopped at an "engine's length," while when called to the stand as a witness for the railroad company he testified on cross-examination that at the time of the accident the train was going "about three or four miles an hour." Loper also testified that the night of the twenty-second of February, 1910, was a cold night, freezing, and the ground was frozen; that at the expiration of the sixteen hour limit the train was probably two miles from Wolf Lake, which was the first switch on the expiration of that limit.

At the close of all the evidence the defendant requested the court to instruct the jury to find in its favor. The court refused to do so, and an exception was noted. There were many other requests to charge asked by the respective parties, some of which were given and some of which were refused and exceptions taken.

There was a verdict and judgment for the plaintiff. The

Court of Appeals affirmed the judgment. 145 Kentucky, 427. Among other things, the court held that there was testimony tending to show negligence, and therefore the binding instruction to the contrary asked by the defendant was rightly refused, and that an instruction as to the operation and effect of the Hours of Service Act was also correct.

We must first dispose of a motion to dismiss which was made and postponed to the hearing on the merits. It rests upon the ground that the case as made by the pleadings presented two distinct causes of action—one at common law irrespective of the statutes of the United States and the other under those statutes, and that the former cause of action was sustained and affords a basis broad enough to support the judgment irrespective of what may have been decided concerning the statutes of the United States. The contention wants foundation in fact. As we have seen the pleadings in express terms exclusively based the right to relief upon the statutes of the United States and no non-Federal ground was either presented below or passed upon. It is true that although the case was exclusively rested upon Federal statutes, as it comes here from a state court, our power to review is controlled by Rev. Stat., § 709, and we may therefore not consider merely incidental questions not Federal in character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse, that is to say, the right of the defendant to be shielded from responsibility under that statute because when properly applied no liability on his part from the statute would result. *Seaboard Air Line Ry.* v. *Duvall*, 225 U. S. 477; *St. Louis, I. M. & S. R. Co.* v. *Taylor*, 210 U. S. 281. And of course as the cause of action alleged was exclusively placed on the Federal statute and the defense therefore alone involved, determining

whether there was liability under the statute, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination. *Swafford* v. *Templeton*, 185 U. S. 487. If as is inferable from the argument, reliance is placed on the ruling of the court below that there was evidence tending to show negligence on the part of the engineer for the purpose of establishing that even if a Federal question was passed upon the case was also decided on an independent non-Federal ground broad enough to sustain the judgment, the proposition is without merit. The mere ruling that there was evidence sufficient to authorize consideration of the case from the point of view of negligence alone, affords no basis for saying that the case was decided on such ground. Mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect. But it was long since pointed out in *Neilson* v. *Lagow*, 12 How. 98, the court speaking through Mr. Justice Curtis, that to admit that the authority to review the action of a state court where it has decided a Federal question can be rendered unavailing by a suggestion "that the court below may have rested its judgment" on a non-Federal ground, would simply amount to depriving this court of all power to review Federal questions if only a party chose to make such a suggestion. But, aside from this, the argument, when rightly considered, reduces itself to this, that the power to review a Federal question which has been expressly decided by a state court does not obtain where such court has also decided another Federal question. This is true since the finding that there was some evidence to go to the jury on the subject of negligence independently considered was necessarily a ruling against the binding instruction asked at the close of the testimony upon the assumption that there was nothing adequate to

go to the jury to show liability under the Federal law. While it is true, as we have said, that coming from a state court the power to review is controlled by Rev. Stat., § 709, yet where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. *Kansas City So. Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias*, 225 U. S. 246.

The plaintiff in error assigns twenty-two alleged errors. We deem it necessary only to refer to those which concern the following subjects: First, the refusal to give the binding instruction asked by the defendant; and, second, an instruction given over the objection and exception of the defendant concerning the act of Congress commonly known as the Hours of Service Act, and in connection therewith a special charge on the same subject, given by the court of its own motion, which was excepted to by both parties.

Let us first consider the interpretation and effect given to the Hours of Service Act as a result of the instructions of the trial court and the action of the court below in approving the same. The instructions given by the trial court were as follows:

"The Court further instructs the Jury that if you shall believe from the evidence that the said Etwal McWhirter had been permitted or required to be or remain on duty continuously for more than 16 consecutive hours next before the accident which caused his death, then the defendant was negligent and liable in damages for said injury and death of Etwal McWhirter, if you shall believe from the evidence that the permitting or requiring the said Etwal McWhirter to be or remain on duty continuously for more than 16 consecutive hours next before his death in any way contributed to the said accident and

death, you will find for the plaintiff such damages as you may believe from the evidence she has sustained by reason of his death, not exceeding the sum of $25,000.

"The Court instructs the jury that unless they believe from the evidence that Etwal McWhirter came to his death on account of the carelessness or negligence of the officers, agents and servants of the defendant, or that said McWhirter was permitted or required by the defendant to be on duty more than sixteen hours consecutively next before his death, and that his being permitted or required to be on duty more than sixteen hours next before his death contributed to his death, the law is for the defendant and the jury should so find."

The Court of Appeals, after reviewing the evidence as to the happening of the accident and stating that it was patent "that it occurred after more than sixteen consecutive hours of continuous service by the intestate on the train," said:

"In thus requiring of the intestate more than sixteen consecutive hours of service, albeit the excess of service over the sixteen hours was but five or seven minutes, appellant violated the statute, *supra;* and as the death of the intestate, from the act of its engineer complained of, occurred while he was engaged in the required continuous service and after the expiration of the sixteen consecutive hours allowed by the statute, there seems to be no escape from the conclusion that the act of appellant in thus extending his service beyond the statutory limit was negligence *per se,* to which the intestate's death must, as a matter of law, be attributed, and, if so, the right of appellee to maintain this action cannot be questioned."

Further declaring that if the right to recover depended alone upon the ability to show that the death of McWhirter was caused by the negligence of the engineer, there was evidence tending to prove such negligence, the court said:

"Recurring to the appellant's violation of the provisions

of the statute prohibiting it from requiring its employés to remain on duty longer than sixteen consecutive hours, we find that the language of the provision in question is mandatory and that the duty it imposes is a definite, absolute duty. Its non-performance may not, therefore, be excused by a showing on the part of the railroad company that it used ordinary care or reasonable diligence to perform it, but was unable to do so. The violation of such a statutory duty is, therefore, negligence *per se*."

And these positive conclusions were deemed to be further reinforced by a citation of decisions of this court enforcing the imperative duty of carriers to maintain in good order all appliances required by the Safety Appliance Act, the court saying:

"The requirements of the statute with respect to the safety appliances to be used on appellant's trains, are no more imperative or mandatory than is the statutory restriction here involved upon its right to suffer its employés to engage in its service more than sixteen consecutive hours. The violation of the statute in either case invites the penalty prescribed, and the offender will not be excused upon a showing of reasonable effort or diligence in attempting to comply with the statutory requirements."

Giving to the views thus expressed by the court, their natural significance, there would seem to be little doubt that it was intended to hold that the effect of the violation of the Hours of Service Act was to create an unconditional liability for all accidents happening during the period beyond the statutory time irrespective of proof showing a connection between the accident and the working over time. In other words, the ruling was that by operation of law the carrier is an insurer of the safety of all his employés while working beyond the statutory time. And it is true also to say that although the instructions given by the trial court may not have as explicitly stated the doctrine as did the Court of Appeals, nevertheless such

instructions rested upon the same interpretation of the statute for the following reasons: *a*, because beyond the proof of working over time there was no offer of proof connecting the accident with the working over time, and, *b*, because it is apparent that the Court of Appeals interpreted the charge upon which it was passing as having that significance and affirmed it for that reason.

In giving to the statute the construction above stated we think error was committed. The Hours of Service Act was approved March 4, 1907, and is entitled "An Act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon." Chapter 2939, 34 Stat. 1415. We are unable to discover in the text of the statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers which the view taken of the act by the court below imposes. We say this because although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employés to work beyond the statutory time to liability for all accidents happening during such period without reference to whether the accident was attributable to the act of working over time. And we think that where no such liability is expressed in the statute it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage. The character of evidence necessary to prove such causation we need not point out, as it must depend upon the circumstances of each case. Conceding that a case could be presented where the mere proof of permitting work beyond the statutory time and the facts and circumstances connected with an accident might be of such a character as to justify not only the conclusion

of negligence, but also the inference of proximate cause, such concession can be of no avail here, since the instruction of the trial court and the ruling affirming that instruction were based upon the theory that the mere act of negligence in permitting an employé to work beyond the statutory period created liability irrespective of the connection between the alleged negligence and the injury complained of.

It is to be observed, however, that even if for the sake of argument the broad expressions of the court below and those of the trial court be so limited as to justify the conception that it was only intended to decide that permitting the working beyond the statutory time was negligence *per se*, giving rise to liability only where the proof showed a causal connection between the injury complained of and such *per se* negligence, the concession would not avoid the Federal question or remove the error. We say this, because indulging in the assumption stated, would render it necessary to determine, as previously pointed out, the Federal question whether there was any evidence tending to show a connection between the asserted negligence and the occurrence of the accident; that is, whether the plaintiff had offered any proof tending to show the existence of the Federal right which was asserted or conversely speaking whether there was any proof tending to establish that the defendant was liable within the terms of the statute—considerations as the right on the one part of the plaintiff, or the immunity on the other part of the defendant, depended exclusively upon the statute, were, in the nature of things both necessarily Federal—since they were from the point of view of the statute correlative. Assuming then that as the result of the hypothesis we have indulged in, the case is reducible to the Federal question last stated, we are clearly of the opinion that as there was no proof tending to show a connection between the permitting of the working beyond the statutory time,

and the happening of the accident, reversible error was committed. Of course the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities, for to so do would but resolve the question back to the generic rule of liability as insurer which we have previously disposed of.

Our conclusion that there was no reasonable tendency in the evidence connecting the permitting of the working over time with the accident may be briefly thus summarized: First, because we think there is nothing in the proof concerning the action of the deceased from which an inference could be drawn, that his jumping from the pilot of the slowly moving engine was in any way caused by the fact that he had been working over time; second, because we think there was no proof tending to show negligence on the part of the engineer and therefore obviously no room to conclude that the fact that he had worked over time negligently contributed to the accident, for the following reasons: *a*, because of the uncontradicted testimony of the engineer and of the telegraph operator whose signal was immediately seen and caused the engineer to stop the train within a car length; *b*, because of the testimony of the operator as to the position of the brakeman when he leaped from the pilot to run towards the switch, of his statement as to the line of vision from where he stood and the brakeman and engineer, the short interval which elapsed, the place where the brakeman in rising after falling was struck by the locomotive as shown by the distance the engine traveled before it came to a stop and the place where the body was found. Indeed, irrespective of the testimony of the telegraph operator, we think, when the natural position of the engineer on the right side of the cab is considered, of the position in which it is unquestionably shown the deceased was, of the short distance which the train moved before it was stopped after

the signal from the operator, it is demonstrated with mathematical certainty that the deceased was not within the possible vision of the engineer as he leaped or stepped from the pilot for the purpose of running along the track to the switch.

The judgment of the Court of Appeals of Kentucky must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE PITNEY, dissenting.

It seems to me that the rulings of the state court, held to be erroneous, are not within the scope of our review under the act (Rev. Stat., § 709; Jud. Code, § 237) that alone confers jurisdiction upon this court to review the judgment of a state court.

The action was based upon the Hours of Service Act of March 4, 1907 (34 Stat. 1415, 1416, c. 2939, § 2), and upon the Employers' Liability Act of April 22, 1908 (35 Stat. 65, c. 149), and the verdict and judgment rest upon the theory that plaintiff's intestate, Etwal McWhirter, a flagman or brakeman upon one of defendant's interstate trains, had been kept continuously at work for more than sixteen consecutive hours, in violation of the former act, and that his death was directly due to the negligence of the locomotive engineer upon the same train, either alone or in conjunction with McWhirter's excessive fatigue due to his having been worked overtime. The negligence of the engineer was of course attributable to the defendant under the act of 1908, and under that act the negligence of the deceased, if shown, would not bar the action.

As I read the record the trial judge instructed the jury to the effect that the violation of the Hours of Service Act created no liability unless there was a causal relation

between the working overtime of the deceased and the catastrophe that resulted in his death. And so, I think, the Court of Appeals of Kentucky interpreted the instructions (145 Kentucky, 427, 441; Instructions 4 and 5).

However, let it be conceded, for present purposes, that the trial court erroneously instructed the jury that the effect of the violation of the Hours of Service Act was to create an unconditional liability for an accident happening after the expiration of the 16-hour limit, and to render the carrier an insurer of the safety of the employé while working beyond the statutory time. And let it be further conceded that the trial court held, and erred in holding, that there was enough in the evidence to warrant a finding that the locomotive engineer was negligent, so as to make the carrier liable under the Employers' Liability Act; or held, erroneously, that there was enough to show a causal relation between the working overtime of McWhirter and the disaster, so as to create a liability under the Hours of Service Act.

It still does not seem to me that the state courts, in overruling defendant's objections to the instructions referred to, or in denying the motion (and sustaining such denial) for direction of a verdict in defendant's favor, decided *against* any "title, right, privilege, or immunity specially set up or claimed" by the defendant under the Constitution or laws of the United States, within the meaning of § 709, Revised Statutes; Judicial Code, § 237. It was the plaintiff in the trial court (now defendant in error) who alone claimed under the laws of the United States. The attitude of the defendant was that of merely denying the validity of her claims. And the rulings of the state court (as is conceded, for argument's sake) erroneously imposed upon the defendant a greater responsibility than those laws warranted; in other words, gave too great force to the Federal statutes. The questions thus raised were undoubtedly Federal questions in

the general sense; that is to say, they arose under the laws of the United States. And I concede that the judgment cannot be sustained upon any independent non-Federal ground. But according to all previous decisions, so far as I am aware, the mere existence of a Federal question in the record is not sufficient to give to this court jurisdiction to review the judgment of a state court; it is necessary that the Federal question shall have been decided in a particular way.

There is a clear distinction between the existence of a Federal question such as would give original jurisdiction to a Federal court because "arising under the Constitution or laws of the United States," etc. (Judicial Code, § 24), or such as would give a right of appeal to this court from those courts (§§ 238, 241), and the *denial* by a state court of a Federal right or immunity, under such circumstances as to give jurisdiction to this court to review the state court's decision.

Section 237, Judicial Code, formerly § 709, Rev. Stat., authorizes a review by this court of the final judgment of the court of last resort of a State only "where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is *against* their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is *in favor of* their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is *against* the title, right, privilege, or immunity especially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority."

Unless the emphatic words—"*against* their validity"—

"*in favor of* their authority"—"*against* the title . . . or immunity *especially set up*," etc.—are to be eliminated from the section, it must be construed as giving, not a mutual or reciprocal right of review of Federal questions decided in the state courts, but an unilateral right of review, dependent upon the way in which the question was decided in the state court.

The distinction has been recognized by this court in cases without number. See *Whitten* v. *Tomlinson*, 160 U. S. 231, 238; *Penn Mutual Life Ins. Co.* v. *Austin*, 168 U. S. 685, 695; *Holder* v. *Aultman*, 169 U. S. 81, 88; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 620.

The terms of § 237, Judicial Code, are not new. Except for using the word "*especially*" instead of "*specially*" the jurisdictional clause is identical with the corresponding clause in § 709, Rev. Stat., under which it has been uniformly held that this court has no general power to review or correct the decisions of the state courts, and is authorized only to protect against alleged violations in state court decisions of rights arising under the Federal authority; that it was not the purpose of Congress to authorize a review by this court whenever a Federal question is decided in a litigation in a state court, but was to prevent the state jurisdictions from impairing or frittering away the authority of the Federal Government by failing to give full force to the statutes, etc., established by that Government; and that therefore the writ of error will lie only when the decision is adverse to the Federal right asserted in the state court by the plaintiff in error; and that a decision in the state jurisdiction upon a Federal question, however erroneous the decision may be, is not to be corrected in this court if the decision be in favor of the right or immunity that is set up under the Federal authority. *Montgomery* v. *Hernandez* (1827), 12 Wheat. 129, 132; *Hale* v. *Gaines* (1859), 22 How. 144, 160; *Murdock* v. *City of Memphis* (1874), 20 Wall. 590, 626; *Mis-*

souri v. *Andriano*, 138 U. S. 496, 499; *Jersey City & Bergen R. Co.* v. *Morgan*, 160 U. S. 288, 292; *DeLamar's Nevada G. M. Co.* v. *Nesbitt*, 177 U. S. 523, 528.

In all these cases the word "immunity," as used in § 709, Rev. Stat., like the associated words "title, right, privilege," has been given its normal affirmative force; the clause meaning not that the plaintiff in error may have merely denied a Federal right asserted against him by his adversary, but that he must have claimed exemption from a liability or obligation asserted against him on grounds of state or of Federal law, by *specially setting up* an immunity because of some statute, or treaty, or constitutional provision of the United States.

The more recent decisions that are sometimes supposed to have given a different construction to § 709, do not, upon critical examination, bear out this view. *Nutt* v. *Knut*, 200 U. S. 12, 19, and cases cited; *Texas Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 434, etc.; *Kansas City Southern Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias*, 225 U. S. 246; *Seaboard Air Line Ry.* v. *Duvall*, 225 U. S. 477. An apparent exception is *St. Louis, Iron Mountain & S. Ry.* v. *Taylor*, 210 U. S. 281, 291, etc. But in that case the plaintiff in error did at least assert a special construction of the Federal act upon which its adversary's suit was based, and upon that special construction claimed an exemption from liability.

I am unable to find in § 709, or in previous decisions of this court, any authority for a review by this court of a decision by a state court sustaining a defendant's liability in an action founded upon a Federal law, although such decision be excepted to; or for reviewing a state court decision that, instead of impairing or limiting the effect of an act of Congress, is alleged to enlarge its scope and effect and the consequent responsibility of a defendant thereunder.